Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

October Term, 2000

BOISE CASCADE CORPORATION, a Delaware corporation,

Petitioner,

v.

STATE OF OREGON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE OREGON COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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January 25, 2001

3600

QUESTIONS PRESENTED

1. Whether respondent's regulatory order forcing petitioner to submit to the physical occupation of its timberland by northern spotted owls constituted a physical taking of petitioner's property for which just compensation is due.

2. Whether petitioner's regulatory takings claim, which arose when respondent issued a self-described "Final Order" denying petitioner's application for a timber harvesting permit, was rendered "unripe" merely because petitioner did not seek a completely different kind of permit from a *separate federal agency* that lacked authority to authorize the harvesting under state law.

PARTIES TO THE PROCEEDING

The caption contains the names of all parties to this proceeding.

CORPORATE DISCLOSURE STATEMENT

Petitioner Boise Cascade Corporation is a Delaware corporation that is a publicly traded company on the New York Stock Exchange. There is no parent or publicly held company owning 10% or more of the corporation's stock.

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R	Final Order of Bureau of Forestry ("BOF") dated January 19, 1993, affirming the State Forester's denial of Boise Cascade's amended plan for timber harvest.

S — Letter dated October 15, 1997, from the Oregon Department of Forestry to counsel for Boise Cascade.

T — Judgment entered by Clatsop County Circuit Court on December 24, 1997, in favor of Boise Cascade in the amount of $1,820,059, plus prejudgment interest.

U — Letter from the BOF's counsel to the USF&WS dated June 16, 1992, and cited in the BOF's Final Order (App. R) as indicating that Oregon law would not be satisfied if the USF&WS were to issue a decision finding that an Incidental Take Permit ("ITP") under the Endangered Species Act was not required.

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AA	Letter from the federal government's counsel to Boise Cascade dated July 30, 1999, concluding that the site had been abandoned by the owls, and notifying Boise Cascade that the government would not oppose dissolving the existing injunction.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Boise Cascade Corporation ("Petitioner" or "Boise Cascade") respectfully petitions for a writ of certiorari to review a judgment on the decision of the Oregon Court of Appeals, reversing a jury verdict and judgment entered in Petitioner's favor in the Circuit Court for Clatsop County before the Honorable Paula J. Brownhill, Judge.

OPINIONS BELOW

The decision of the Oregon Court of Appeals of *Boise Cascade Corp. v. State ex rel. Oregon State Board of Forestry*, is reported in 991 P.2d 563 (Or. App. 1999), and is reproduced as Appendix A ("App. A"). A copy of that court's March 15, 2000 order (CA A100855) denying reconsideration and affirming its prior decision is reproduced as Appendix B ("App. B"). The Oregon Supreme Court's October 24, 2000 order denying Petitioner's petition for review (SC S47459) is reproduced as Appendix C ("App. C"). The letter opinion of the Clatsop County Circuit Court (No. 93-2018) denying Petitioner summary judgment on its possessory takings claim, based on *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 424 (1982), and granting summary judgment on the issue of liability on its regulatory takings claim based on *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), is reproduced as Appendix D ("App. D"). The jury verdict finding State of Oregon ("the State") liable on Petitioner's *Loretto* claim and making findings on the compensation issues is reproduced as

Appendix E ("App. E"). The circuit court's judgment is reproduced as Appendix F ("App. F").

Prior to the trial, there was another set of appeals after the case originally had been dismissed by the Clatsop County Circuit Court. The Oregon Court of Appeals' opinion on the prior appeal, which reversed the trial court, is reported in *Boise Cascade Corp. v. Board of Forestry*, 886 P.2d 1033 (Or. App. 1994) and is reproduced as Appendix G ("App. G"). In that instance, at the State's request, the Oregon Supreme Court granted review and affirmed in part and reversed in part the court of appeals. The Oregon Supreme Court's opinion is reported in 935 P.2d 411 (Or. 1997) and is reproduced as Appendix H ("App. H").

STATEMENT OF JURISDICTION

The order of the Oregon Supreme Court denying Petitioner's petition for review of the decision of the Oregon Court of Appeals was issued on October 24, 2000. (App. C.) The appellate judgment was entered on December 15, 2000, and is reproduced as Appendix I ("App. I"). This petition is being timely filed within 90 days of entry of that judgment. 28 U.S.C.A. § 2101(c) (West 1994). The Court has jurisdiction in this matter pursuant to 28 U.S.C.A. § 1257(a) (West 1993), because the Oregon regulatory scheme as enforced by the Oregon court is repugnant to the Supremacy Clause and the Fifth and Fourteenth Amendments to the U.S. Constitution.

The Oregon Court of Appeals vacated a judgment based upon a jury verdict which found that Petitioner's rights under the Takings Clause had been violated because a state regulation required Petitioner to submit to an occupation of its property as a spotted owl nesting site. In vacating this judgment, the court of appeals ruled as a matter of law that this Court's decision in *Loretto* did not apply because "[t]he state has no control over where spotted owls choose to nest." (App. A; 991 P.2d at 570.) The Oregon Court of Appeals also overturned the circuit court's ruling that Petitioner was entitled to summary judgment on its *Lucas* claim. The appellate court held that the *Lucas* claim was not "ripe" for adjudication because Petitioner had not attempted to obtain an Incidental Take Permit ("ITP") pursuant to the Endangered Species Act of 1973 ("ESA"), 16 U.S.C.A. § 1531, *et seq.* (West 1985 & Supp. 2000) from the U.S. Fish & Wildlife Service ("USF&WS"), which, if granted, would have given the Oregon Board of Forestry ("BOF") discretion to approve Boise Cascade harvesting its timber. 991 P.2d at 572-73.

CONSTITUTIONAL PROVISIONS INVOLVED

The federal constitutional provisions at issue in this case are the Takings or Just Compensation Clause of the Fifth Amendment, which provides: "[N]or shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

It is made applicable to the states through the Due Process Clause of the Fourteenth Amendment, which provides: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. XIV, § 1.

STATUTORY AND ADMINISTRATIVE PROVISIONS INVOLVED

The Petitioner was prohibited from harvesting timber on its property based upon Oregon Administrative Rule 629-665-0210 (2000), formerly numbered 629-024-0809, the pertinent parts of which provide:

> (1) Whenever the State Forester determines that an operation will conflict with protection of a nesting site of the northern spotted owl (Strix occidentalis caurina), the operator must obtain the State Forester's approval of a written plan before commencing the operation. The written plan, at a minimum, must address how the operation will be conducted to provide for the following:
>
> (a) A 70 acre area of suitable spotted owl habitat encompassing the nest site, to be maintained as suitable spotted owl habitat;
>
> (b) Prevention of disturbances resulting from operation activities which cause owls to flush from the nesting site . . . .

> (2) For the purposes of this rule, nesting site means and includes the tree, when known, containing a spotted owl nest; or when not specifically known, includes an activity center of a pair of adult spotted owls. An activity center is a location determined by the State forester to have been reliably identified as being occupied by an adult pair of spotted owls, capable of breeding . . . .
>
> . . . .
>
> (5) Exceptions to the requirements for protecting northern spotted owl nesting sites may be approved by the State Forester if the operator has obtained an incidental take permit from federal authorities under the federal Endangered Species Act.

This Rule is reproduced in its entirety as Appendix J ("App. J"). Also involved are Oregon Administrative Rules 629-680-0000 (2000), formerly 629-056-0010; 629-680-0010(5) (2000), formerly 629-056-0020(5); 629-680-0100(1) (2000), formerly 629-056-0100(1); and 629-680-0220 (2000), formerly 629-056-0220, which declare, define and together provide for the protection of such sites as public resources. Each of these rules is reproduced in Appendices K through N, respectively ("App. K," "App. L," "App. M," "App. N").

The USF&WS is authorized to issue an ITP for the "taking" of a threatened species under section 9 of the ESA, 16 U.S.C.A. § 1539 (West 1985 & Supp. 2000).

STATEMENT OF THE CASE

A. Procedural History.

In June 1990, the USF&WS indicated it intended to list the northern spotted owl as a threatened species under the ESA. On July 23, 1990, that listing took effect. Endangered & Threatened Wildlife & Plants, 55 Fed. Reg. 26,114 (Fish & Wildlife Serv. June 26, 1990). At the same time, the USF&WS issued *Procedures Leading to Endangered Species Act Compliance for the Northern Spotted Owl* ("Guidelines"), requiring the preservation of 70 acres of timber around the northern spotted owl nest sites. A copy of the Guidelines is reproduced as Appendix O ("App. O").

Based on those Guidelines, the BOF adopted the former Oregon Administrative Rule 629-024-0809(1) and (2) (renumbered now at 629-665-0210(1) and (2) (2000) (*see* App. J)), requiring private landowners to also protect a 70-acre area around a nest site or an activity center to be "occupied by an adult pair of spotted owls, capable of breeding." Or. Admin. Rule 629-665-0210.

Prior to the time the owls were listed, Petitioner had in 1988 acquired a 65-acre parcel of timber as a part of a land trade with another forest products company. That parcel is known as the Walker Creek Unit (the "Unit"). (App. G; 886 P.2d at

1035.) In 1989, Petitioner cleared a road into the Unit in anticipation of full-scale logging of the timber the following year. However, when the owls were listed in 1990, Petitioner stopped cutting trees in the Unit.

In October 1991, the USF&WS rescinded its Guidelines as the result of a legal action challenging them. A copy of the memorandum rescinding the Guidelines is reproduced as Appendix P ("App. P"), and the Memorandum Order of the U.S. District Court for the District of Columbia pertaining to the recission of the Guidelines is reproduced as Appendix Q ("App. Q").

In February 1992, Boise Cascade filed in compliance with Oregon law a written plan with the Oregon State Forester ("State Forester") seeking permission to harvest the subject timber. (App. G; 886 P.2d at 1036.) That plan was denied by the State Forester based on Or. Admin. Rule 629-665-0210. The Forester indicated that Petitioner needed to protect approximately 56 acres of timber on its land as spotted owl nesting habitat (the other 14 acres comprising the core area were on adjacent lands owned by the State and another private landowner). On May 5, 1992, Boise Cascade submitted an amended plan that was also denied, because it refused to acquiesce in designating 56 acres of its land as a public resource as a nesting site for the owls. 886 P.2d at 1036. It then appealed that denial to the BOF, which affirmed the State Forester's denial of the plan in a "Final Order" on January 19, 1993, a copy of which is reproduced as Appendix R ("App. R"). Boise Cascade then sought review of

the agency's order by the Oregon Court of Appeals, which affirmed the BOF's Final Order on December 7, 1994. (App. G; 886 P.2d at 1041.) That order was then also affirmed by the Oregon Supreme Court on April 10, 1997. (App. H; 935 P.2d 411.)

B. The Case.

After the BOF issued its Final Order, Boise Cascade commenced an inverse condemnation action against the State in Clatsop County Circuit Court alleging a "taking" of its timber under the Fifth Amendment to the U.S. Constitution and a similar provision in the Oregon Constitution. The State then filed a motion to dismiss on various grounds, including that Petitioner had failed to allege facts sufficient to state a claim under the Fifth Amendment. The circuit court granted the State's motion on all grounds, and Petitioner appealed to the Oregon Court of Appeals.

The court of appeals reversed on all grounds, holding that valid takings claims were alleged under both the Fifth Amendment and the Oregon Constitution. (App. G; 886 P.2d 1033.) The State then sought review by the Oregon Supreme Court, which was granted. The Oregon Supreme Court affirmed that Petitioner had alleged a valid takings claim for the 56 acres of timber it had been prevented from logging. The court reversed as to a temporary takings claim, involving another four acres located outside the protected nesting site, that Petitioner had been delayed in harvesting because of a temporal restriction.

(App. H; 935 P.2d at 411, 420 n.14.) The court remanded the case to the circuit court for trial. (App. H.)

After remand, Petitioner filed an amended complaint that separated its claim based on the Fifth Amendment into two counts. The first was a physical occupation theory based on *Loretto*, and the second was a regulatory takings theory based on *Lucas*. Petitioner then moved for summary judgment as to the issue of liability on both counts of its federal claim. (App. A; 991 P.2d at 563 and 569.)

On October 15, 1997, the Oregon Department of Forestry informed Boise Cascade by letter that "of the pair that previously occupied the Walker Creek site, the female was found dead last winter, and the male was recently observed at [another] site more than eight miles away." The letter is reproduced as Appendix S ("App. S"). *See also* 991 P.2d at 565. The letter went on to inform Petitioner that the State considered the nest site to be no longer protected under Oregon law, but suggested Petitioner consult with the USF&WS because that agency might consider the site to still be protected under the ESA. (App. S.) The following day, the circuit court issued a letter opinion granting Petitioner summary judgment on its *Lucas* count and denying its summary judgment on its *Loretto* count. *See* 991 P2d at 565.

Petitioner then filed a Supplemental Complaint alleging a temporary taking for the almost five years that it had been denied the right to harvest the 56 acres of timber because of the Oregon regulation. At the conclusion of the trial, the circuit court

submitted the issue of liability as to Petitioner's *Loretto* count to the jury. A unanimous jury found that "plaintiff Boise Cascade Corporation [was] required to submit to a physical occupation of its property as a result of the Board of Forestry's Order." (App. E.) It also made findings as to the fair market value of the timber both at the time the Final Order was entered denying Petitioner the right to harvest the timber and the date the State declared the site to have been abandoned by the owls. (*Id.*) As a result of those findings, a judgment was entered in the amount of $1,820,059, including interest from the date of the taking (the court of appeals' opinion incorrectly states that the judgment was for $2,279,223). (App. A; 991 P.2d at 565.) A copy of that judgment is reproduced as Appendix T ("App. T").

The State appealed. The Oregon Court of Appeals reversed the judgment, holding that Petitioner could not state a claim for the occupation of its land, based upon *Loretto*, because "[t]he State has no control over where spotted owls chose to nest." (App. A; 991 P.2d at 570.) It also reversed the summary judgment on the count based on *Lucas*. The court held that Petitioner's regulatory takings claim was not "ripe" for adjudication because there was the possibility that if Boise Cascade had applied to the USF&WS for an ITP and one had been granted, the BOF could have exercised its discretion under Or. Admin. Rule 629-665-0210(5) (2000) to approve Petitioner's logging plan. The Oregon Supreme Court then denied review. 331 Or. 244, ___ P.3d ___ (Or. Oct. 24, 2000).

REASONS FOR GRANTING THE PETITION

Supreme Court Rule 10(b) lists among the considerations governing review on certiorari the circumstance in which a state court of last resort has decided a federal question in a way that conflicts with the decision of a federal court of appeals. In this case the decision was rendered by a lower appellate court and the state court of last resort refused to grant review. (App. C.) Under Rule 10(c), a ground for review exists when a state court has decided an important question of federal law that has not been, but should be, settled by this Court or has decided a federal question in a way that conflicts with applicable decisions of this Court. All of these grounds for review are present in this case.

I. This Case Involves Two Important Constitutional Questions That Should Be Resolved by This Court.

The precedent established below is the latest in a growing number of cases arising out of government regulations that require property owners to leave their land in its natural condition so that it can be occupied as wildlife habitat and, at the same time, denies the property owner compensation for the imposition of a wildlife servitude. *Cf. Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (involving a navigational servitude.) These are the same type of wildlife servitudes that the federal government regularly acquires by eminent domain. *See North Dakota v. United States*, 460 U.S. 300 (1983). Oregon law does

not authorize the state to use its power of eminent domain for that purpose. Or. Rev. Stat. §§ 271.715(1), 271.725(1) (1999).

A. Under a Physical Occupation Theory the Test Is Whether the Landowner Has the Right to Exclude Wildlife, Not Whether the State Has Control Over It.

The court below shifted the focus of this Court's physical takings jurisprudence from the issue of whether there had been a forced occupation authorized by government, to whether government had control over the occupant, which this Court has never deemed to be the determining factor. *Loretto*, 458 U.S. at 432 n.9; *Yee v. City of Escondido*, 503 U.S. 519, 522 (1992). In a physical takings case, the key issue is whether the landowner has the right to exclude the government-authorized occupant and has been forced to acquiesce to the occupation. 503 U.S. at 527; *Kaiser Aetna*, 444 U.S. at 176. Due to the ESA and state regulations that impose similar wildlife servitudes, there are a growing number of cases in which government has imposed wildlife servitudes. Courts have refused to find a taking and award compensation. *Christy v. Hodel*, 857 F.2d 1324 (9th Cir. 1988), *cert. denied*, 490 U.S. 1114 (1989) (*see* opinion of Justice White dissenting); *Fla. Game & Fresh Water Fish Comm'n v. Flotilla, Inc.*, 636 So. 2d 761 (Fla. Dist. Ct. App.), *review denied*, 645 So. 2d 452 (Fla. 1994). In *Sierra Club v. Department of Forestry & Fire Protection*, 26 Cal. Rptr. 2d 338 (Cal. Ct. App. 1993), the California Supreme Court affirmed the lower court, 876 P.2d 505 (Cal. 1994), but omitted any

discussion of the takings issue and took the extraordinary step of directing that the lower court's opinion not be published in the official reports. No. S037820, 1994 Cal. LEXIS 1388 (Cal. Mar. 18, 1994).

Here, the subject regulation goes beyond merely regulating the use of Petitioner's land by requiring that Petitioner use it for only one purpose. *Yee*, 503 U.S. at 522-23. It prohibits Petitioner from conducting any activity on its property that "cause[s the] owls to flush from the nesting site." Or. Admin. Rule 629-665-0210(1)(b) (2000). Petitioner had no choice under the subject regulation but to acquiesce to the occupation of its timber as a nesting site. 503 U.S. at 527 ("The government effects a physical taking only where it *requires* the landowner to submit to the physical occupation of his land." (emphasis in original)). In *Southview Associates, Ltd. v. Bongartz*, 980 F.2d 84, 94 (2d Cir. 1992), the Second Circuit held that there had been no taking because the landowner could exclude from its property the wildlife (deer) that the state sought to protect and log "the entire 44 acres of critical softwood in the deeryard." By contrast, Petitioner was prevented by the subject regulation from harvesting its timber or doing anything that could cause the birds to "flush from the nesting site." The State consequently exerted as much control over Petitioner's property as if it had acquired a formal easement. Or. Admin. Rule 629-665-0210(1)(b); *cf. North Dakota*, 460 U.S. 300. Petitioner was prevented from excluding the owls from its property.

B. A State May Not Require a Landowner to Obtain a Permit from a Federal Agency in Order to Satisfy "Ripeness," When It Is Under No Obligation to Issue Its Own Permit, Even if the Federal Permit Is Granted.

The second important issue involves satisfying the ripeness requirement before adjudicating a regulatory takings claim. If the decision below is left to stand, a state administrative agency could avoid making a final decision satisfying ripeness, by unfairly requiring the landowner to pursue a collateral approval from a federal agency that has no authority to either approve or disapprove the petitioner's logging plan. In this case, even if Petitioner had obtained an ITP from the USF&WS, the state agency was under no obligation under Oregon law to exercise its discretion so as to approve Petitioner's logging plan.

"Ripeness" is satisfied when "the initial decision-maker has arrived at a definitive position on the issue that inflicts an actual, concrete injury." *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 193 (1985). The BOF's Final Order certainly did that. Under the BOF's own regulation, it had no discretion but to deny Petitioner the right to harvest 56 acres of merchantable timber, unless Petitioner obtained an ITP for the owls from the USF&WS. Moreover, the BOF did not base its decision on the possibility that it might, in the future, approve Petitioner's logging plan, if Boise Cascade obtained an ITP. In fact, the BOF's Final Order (App. R) cites a letter from its counsel to the USF&WS, reproduced as

Appendix U ("App. U"), indicating that Oregon law would not be satisfied if the USF&WS were to issue a decision finding that an ITP was not required. Likewise, potential future exercise of discretion by the BOF allowing Petitioner to log its timber based upon an ITP from the USF&WS would not bar a temporary takings claim based on the BOF's Final Order. Until that Final Order was reversed, a taking was occurring. *Lucas*, 505 U.S. at 1012-13; *First English Evangelical Lutheran Church v. County of Los Angeles, Cal.*, 482 U.S. 304 (1987). The granting of an ITP, and a waiver based upon it, would have merely turned a permanent taking into a temporary one.

Under *Williamson County*, a landowner is not required to seek review from another agency that does not have the authority to participate in the decision-making process. 473 U.S. at 193. The USF&WS had no authority to authorize logging; its only concern under the ESA is to prevent the owls from being harmed. *Babbitt v. Sweet Home*, 515 U.S. 687 (1995). By requiring Petitioner to apply for an ITP under the ESA, the State was imposing a requirement as a condition for its approval that does not exist under federal law. *Defenders of Wildlife v. Bernal*, 204 F.3d 920, 927 (9th Cir. 2000).

Nor, as this Court subsequently stated in *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 350 n.7 (1986), can government require "unfair procedures in order to" satisfy ripeness. Trying to obtain an ITP from the USF&WS under the exception provision in Or. Admin. Rule 629-665-0210(5) would have been both unfair and an exercise in futility. *City of*

Monterey v. Del Monte Dunes of Monterey, Ltd., 526 U.S. 687, 698-99 (1999).

It would have been unfair because the ITP process would likely have added years to the administrative process and required conservation measures far broader than those needed for the owls nesting in Petitioner's timber. *See* Barton H. Thompson, Jr., *The Endangered Species Act: A Case Study in Takings & Incentives*, 49 Stan. L. Rev. 305, 326, 335 (1997) ("Property owners repeatedly voice dismay over their almost Kafkaesque inability to reach closure under the ESA."); and Daniel A. Hall, *Using Habitat Conservation Plans to Implement the Endangered Species Act in Pacific Coast Forests: Common Problems & Promising Precedents*, 27 Envtl. L. 803, 805 (1997) (The USF&WS requires as a part of a Habitat Conservation Plan that is part of the ITP process that landowners not only protect habitat for the subject species of the ITP, but for "all species which might ever reside on the property"). Likewise, even if an ITP were issued, the BOF was not required to approve Petitioner's logging plan. There is no reason to believe the BOF would have waived protecting the site so long as the owls occupied the site. Or. Admin. Rule 629-665-0210(5); (App. J).

It would have been an exercise in futility, because the record on appeal clearly indicates that if Petitioner had sought an ITP from the USF&WS in 1993, before the BOF's Final Order, the USF&WS would not have issued an ITP.

After the Oregon Court of Appeals issued its opinion reversing the judgment in Petitioner's favor, Boise Cascade

moved for reconsideration. In asking the court to reconsider its holding that Petitioner's regulatory takings claim was not "ripe," Boise Cascade moved to supplement the record concerning what had occurred after the BOF had issued its Final Order and the case had been pending in the courts for over six years. That motion was granted in part in an order reproduced as Appendix V ("App. V").

That record shows that shortly before the State deemed the Boise Cascade nest site to have been abandoned, the USF&WS obtained an injunction against another timber owner because there was a spotted owl activity center approximately one mile away from the harvest site (a mile's distance is well beyond the 70-acre core area protected under state law). *United States v. Coast Forest Res. Ltd. Pship*, U.S.D.C. Or. Civil No. 96-1575-HO, 2000 WL 298707 (Order dated July 28, 1997 at 1). A copy of that order is reproduced as Appendix W ("App. W"). That injunction was not lifted until almost three years later when, after monitoring the owls' movements by radiotelemetry, the USF&WS failed to prove that logging the subject timber would have any significant impact upon them. 2000 WL 298707 at *5. Also while this action was pending before the Oregon courts, the State brought a legal action against the USF&WS alleging that it had threatened to take legal action against the State and its employees, pursuant to the ESA, if they failed to enforce the Guidelines that the USF&WS had been forced to rescind. *State of Oregon v. Int'l Paper Co.*, U.S.D.C. Or. Civil No. 93-6223-HO (Complaint dated July 1993 at 4). A

copy of that Complaint is reproduced as Appendix X ("App. X").

Shortly after the State, in October 1997, declared the nest site on Petitioner's land to have been abandoned, Boise Cascade submitted, and the State Forester approved, a new logging plan to harvest the 56 acres that had previously been protected. Petitioner, through its counsel, also inquired of the USF&WS whether it still considered the site to be protected under the ESA due to the death of the female owl and the abandonment of the nesting site by the male owl. Counsel for the federal government responded by indicating that the USF&WS did still consider the nesting site to be occupied and suggested Boise Cascade apply for an ITP if it desired to harvest its timber. A copy of the federal government's December 10, 1997 letter is reproduced as Appendix Y ("App. Y"). Petitioner then commenced an action in the United States District Court for the District of Oregon against the USF&WS, seeking a declaratory judgment that the site was no longer occupied and was, therefore, no longer protected under the ESA. *Sweet Home,* 515 U.S. 687. The federal government filed a counterclaim seeking an injunction barring Petitioner from logging its timber because the USF&WS did not consider the nest site to have been abandoned. The district court granted the government an injunction prohibiting Petitioner from cutting any trees on its property unless it first obtained an ITP for the owls. A copy of the district court's decree and judgment is reproduced as Appendix Z ("App. Z").

As a result of the injunction, Petitioner submitted an application for an ITP to the USF&WS, along with a Habitat Conservation Plan for the Unit. In August 1999 the USF&WS also came to the conclusion that the site had been abandoned and notified Boise Cascade that it would not oppose dissolving the injunction. A copy of that letter is reproduced as Appendix AA ("App. AA"). This was two years after the State had declared the site to have been abandoned. Over nine years elapsed between the time the State adopted its regulations that prevented Petitioner from logging its timber and the date the federal injunction was lifted. The law does not require the doing of a useless act in order to satisfy ripeness.

The BOF's Final Order clearly defined the impact of the regulation on Petitioner's property: it was prevented from making any economic use of 56 acres of merchantable timber. Once the BOF issued its Final Order there was no question about how the subject regulations applied to the particular land in question. *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 739 (1997). At that point there was no permissible economic use of the timber subject to the restriction. The BOF had no discretion under its own rule but to deny Petitioner's logging plan, unless Petitioner was successful in the future in obtaining an ITP for the owls from the USF&WS. Moreover, as this Court stated in *Suitum*, Petitioner's "takings claim [cannot] be kept at bay from year to year * * *" on the remote possibility that the USF&WS would grant an ITP, which in turn would allow the BOF to exercise its discretion and approve Petitioner's

logging plan. *Id.* at 741. Such a rule, as adopted by the subject regulation and approved by the courts below, would allow the State "to stultify the Fifth Amendment's guarantee." *Id.*

This Court's prudential ripeness doctrine is based on the fact that land use boards usually have a "high degree of discretion" in applying a law to a parcel of property. *Id.* at 738. However, the BOF was not applying a land use regulation, and it had no discretion under Or. Admin. Rule 629-665-0210, but to deny Petitioner the right to log the area surrounding the spotted owl nest site. Even if Petitioner had applied for an ITP after the BOF had issued its Final Order in 1992, that would not have barred Petitioner's claim for compensation for a temporary takings claim for the period it was prevented from logging its property. *First English*, 482 U.S. 304; *Lucas*, 505 U.S. 1003. If the USF&WS had denied an ITP, the BOF had no authority to reverse its Final Order and allow Petitioner to log its property. Or. Admin. Rule 629-665-0210(5). While if the ITP was granted, the BOF was also under no obligation to reverse its Final Order and allow Petitioner to log its property. *Id.*

II. The Petition Should Be Granted Because the Decision Below Conflicts with Decisions of This Court and Other Federal and State Courts.

The Oregon Court of Appeals' reversal of the "takings" judgment entered here after trial is contrary to the basic physical taking jurisprudence of this Court as stated in *Loretto*, *Yee* and *Kaiser Aetna*. There is, however, a split among the lower courts

in cases involving wildlife over whether a property owner can sustain a claim based on a physical takings theory. The better reasoned cases focus on whether the property owner has the right under the subject law to exclude the animals from its land. If not, the forced occupation imposes a wildlife servitude. *Southview Associates*, 980 F.2d 84; *Bailey v. Holland*, 126 F.2d 317, 324 (4th Cir. 1942) ("If the Government wishes to do more in the way of protecting migratory birds than prohibiting their slaughter, * * * it must acquire some proprietary interest in the areas suitable for such uses."); *State v. Herwig*, 117 N.W.2d 335, 340 (Wis. 1962) (holding that in order to protect bird nesting habitat on private land "the state should acquire whatever rights or easements are needed by purchase, lease or condemnation"); *Shellnut v. Ark. State Game & Fish Comm'n*, 258 S.W.2d 570, 574 (Ark. 1953) (taking of private property for a wildlife refuge); *Moerman v. State*, 21 Cal. Rptr. 2d 329, 333-34 (Cal. Ct. App. 1993) (holding that there was no taking under *Loretto* because the landowner had the right to exclude elk from his property).

In conflict with this line of cases, are those such as the decision below that avoid the exclusion analysis, and hold that there was no forced occupation that constituted a taking because the State has no control over wildlife. *See also Christy*, 857 F.2d 1324; *Fla. Game & Fresh Water Fish Comm'n*, 636 So.2d 761; *Sierra Club*, 26 Cal. Rptr. 338.

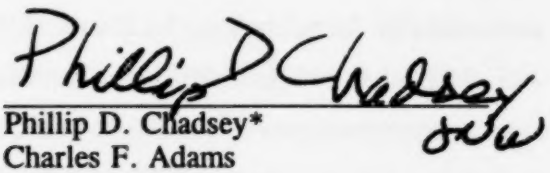
As pointed out above, the Oregon courts have raised hurdles to satisfying prudential ripeness requirements that go far

beyond this Court's takings jurisprudence. *Cf. Palazzolo v. State ex rel. Tavares*, 746 A.2d 707 (R.I. 2000), *cert. granted*, 69 U.S.L.W. 3257 (Oct. 10, 2000).

CONCLUSION

Petitioner respectfully urges the Court to grant the Petition for Writ of Certiorari.

Dated this 25th day of January, 2001.



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(2) Supreme Court, U.S.
FILED

001238 JAN 30 2001

OFFICE

No. ____

In the Supreme Court of the United States

October Term, 2000

BOISE CASCADE CORPORATION, a Delaware corporation,

Petitioner,

v.

STATE OF OREGON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE OREGON COURT OF APPEALS

APPENDIX TO PETITION FOR WRIT OF CERTIORARI VOLUME I

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TABLE OF APPENDICES

Appendix	Document
A	*Boise Cascade Corp. v. State ex rel. Oregon State Board of Forestry*, 991 P.2d 563 (Or. App. 1999).
B	Order of Oregon Court of Appeals dated March 15, 2000, in *Boise Cascade Corp. v. Board of Forestry* (CA A100855), denying reconsideration of its prior decision reported at 991 P.2d 563.
C	Order of the Oregon Supreme Court dated October 24, 2000, in *Boise Cascade Corp. v. Board of Forestry*, ___ P.2d ___ (SC S47459), denying petition for review.
D	Letter Opinion dated October 16, 1997, of the Clatsop County Circuit Court (No. 93-2018) denying Petitioner summary judgment on its possessory takings claim, and granting summary judgment on the issue of liability on Petitioner's regulatory takings claim.
E	Jury Verdict dated November 21, 1997, in *Boise Cascade Corp. v. Board of Forestry* (Clatsop County Circuit Court No. 93-2018), finding the State liable on Petitioner's *Loretto* claim and making findings on the compensation issues.
F	Judgment of the Clatsop County Circuit Court in *Boise Cascade Corp. v. Board of Forestry*, No. 93-2018, entered on April 30, 1993.
G	*Boise Cascade Corp. v. Board of Forestry*, 886 P.2d 1033 (Or. App. 1994).

H — *Boise Cascade Corp. v. Board of Forestry*, 935 P.2d 411 (Or. 1997).

I — Appellate Judgment in *Boise Cascade Corp. v. Board of Forestry*, (CA A78968, A79458, SC S47459), entered on December 15, 2000.

J — Oregon Administrative Rule 629-665-0210 (2000), formerly numbered 629-024-0809.

K — Oregon Administrative Rule 629-680-000 (2000), formerly numbered 629-056-0010.

L — Oregon Administrative Rule 629-680-0010(5) (2000), formerly numbered 629-056-0020(5).

M — Oregon Administrative Rule 629-680-0100(1) (2000), formerly numbered 629-056-0100(1).

N — Oregon Administrative Rule 629-680-0220 (2000), formerly numbered 629-056-0220.

O — USF&WS *Procedures Leading to Endangered Species Act Compliance for the Northern Spotted Owl* ("Guidelines"), dated July 1990.

P — USF&WS Memorandum issued October 2, 1991, rescinding Guidelines.

Q — Memorandum Order of the U.S. District Court for the District of Columbia dated February 27, 1992, regarding USF&WS's recission of the Guidelines.

R — Final Order of Bureau of Forestry ("BOF") dated January 19, 1993, affirming the State Forester's denial of Boise Cascade's amended plan for timber harvest.

S — Letter dated October 15, 1997, from the Oregon Department of Forestry to counsel for Boise Cascade.

T — Judgment entered by Clatsop County Circuit Court on December 24, 1997, in favor of Boise Cascade in the amount of $1,820,059, plus prejudgment interest.

U — Letter from the BOF's counsel to the USF&WS dated June 16, 1992, and cited in the BOF's Final Order (App. R) as indicating that Oregon law would not be satisfied if the USF&WS were to issue a decision finding that an Incidental Take Permit ("ITP") under the Endangered Species Act was not required.

V — Order of Oregon Court of Appeals in *Boise Cascade Corp. v. Board of Forestry* (CA A100855) dated January 6, 2000, granting in part Boise Cascade's Motion for Reconsideration.

W — Injunction Order dated July 28, 1997, in *United States v. Coast Forest Res. Ltd. P'ship*, U.S.D.C. Or. Civil No. 96-1575-HO, 2000 WL 298707 enjoining another timber owner because there was a spotted owl activity center approximately one mile away from the harvest site.

X — Complaint filed in *State of Oregon v. Int'l Paper Co.*, U.S.D.C. Or. Civil No. 93-6223-HO, dated July 1993.

Y — Letter dated December 10, 1997, from the federal government to counsel for Boise Cascade suggesting that Petitioner should apply for an ITP.

Z — Decree and Judgment entered on October 15, 1998, by the United States District Court for the District of Oregon in *Boise Cascade Corporation v. Michael J. Spear*, No. 97-1810-JO, granting the federal government an injunction prohibiting Petitioner from cutting any trees on its property unless it first obtained an ITP.

AA — Letter from the federal government's counsel to Boise Cascade dated July 30, 1999, concluding that the site had been abandoned by the owls, and notifying Boise Cascade that the government would not oppose dissolving the existing injunction.

991 P.2d 563 (Or.App. 1999)

BOISE CASCADE CORPORATION, a Delaware corporation, Respondent,

v.

STATE OF Oregon, By and Through the OREGON STATE BOARD OF FORESTRY, Appellant.

(93-2018; CA A100855)

Court of Appeals of Oregon

Appeal After Remand from Circuit Court,
Clatsop County
Paula J. Brownhill, Judge

Argued and Submitted Feb. 22, 1999.

Decided Nov. 10, 1999.

John T. Bagg, Assistant Attorney General, argued the cause for appellant. With him on the briefs were Hardy Myers, Attorney General, and Michael D. Reynolds, Solicitor General.

Phillip D. Chadsey, Boise, ID, argued the cause for respondent. With him on the brief were Charles F. Adams and Stoel Rives LLP.

Daniel Kearns, Portland, Reeve Kearns PC, and John D. Echeverria, San Francisco, CA, filed a brief amicus curiae for Audubon Society of Portland.

Brent D. Boger, Robin L. Rivett, and Eric Grant, Sacramento, CA, filed a brief amicus curiae for Pacific Legal

Foundation, Oregon Farm Bureau, and California Farm Bureau Federation.

Before De MUNIZ, Presiding Judge, and DEITS, Chief Judge, and ARMSTRONG, Judge.

De MUNIZ, P.J.

The state appeals from a jury verdict in favor of plaintiff Boise Cascade (Boise) on its claim for a temporary taking of a stand of timber in which a pair of northern spotted owls were nesting. For the following reasons, we reverse and remand.

In 1988, Boise acquired 1,770 acres of commercial timberlands in Clatsop County and conducted some logging activities on its property. Also in 1988, the Oregon Department of Fish and Wildlife designated the northern spotted owl as a threatened species. In 1990, the State Forester adopted an administrative policy precluding timber harvesting within a 70-acre area around known spotted owl nesting sites, ultimately codified as *former* OAR 629-24-809.[1] In 1991, Boise sold all of

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[1] *Former* OAR 629-24-809 provided, in part:

"(1) Whenever the State Forester determines that an operation will conflict with protection of a nesting site of the northern spotted owl * * *, the operator must obtain the State Forester's approval of a written plan before commencing the operation. The written plan, at a minimum, must address how the operation will be conducted to provide for the following:

"(a) A 70-acre area of suitable spotted owl habitat encompassing the nest site, to be maintained as suitable spotted owl habitat[.]"

A substantially similar rule is currently found at OAR 629-665-0210.

those commercial timberlands except for a 64-acre parcel (the Walker Creek site), which the buyer refused to accept due to the presence of a northern spotted owls' nest on the site. The present dispute centers around the state's refusal to permit logging on the Walker Creek site during the period that the spotted owls were nesting there.

A spotted owl had been seen on the Walker Creek site in 1986, and a pair of spotted owls nested on the site in 1990, hatching two offspring. Another spotted owl was seen on the site in 1991. A breeding pair was present on the site in 1992. In early 1992, Boise sought approval from the State Forester of its plan to harvest the timber on the site. The State Forester did not approve Boise's harvesting plan because the plan did not identify for protection 70 acres of suitable spotted owl habitat encompassing the nesting site at Walker Creek. The Board of Forestry upheld the denial of Boise's plan on the ground that the proposed plan failed to comply with *former* OAR 629-24-809. A subsequent plan permitted Boise to log several acres of the Walker Creek site but only during time frames when no owls were nesting on the site.

Boise initiated this action for inverse condemnation, arguing that the refusal to permit it to log the Walker Creek site constituted a taking under Article I, section 18, of the Oregon Constitution, as well as under the Fifth Amendment, as applied to the states through the Fourteenth Amendment, of the United States Constitution. Boise further alleged that the restriction on logging the other acres during the owl nesting season was a temporary taking under both constitutions. The trial court dismissed the complaint. On appeal, we reversed, *Boise Cascade Corp. v. Board of Forestry*, 131 Or.App. 538, 886 P.2d 1033 (1994), and the Supreme Court allowed review. On review, the Supreme Court affirmed in part and reversed in part, concluding that, although Boise failed to state a claim for a temporary taking of the small amount of timber that the Board of

Forestry permitted to be logged, Boise did state a claim for a taking of the remainder of the Walker Creek site. *Boise Cascade Corp. v. Board of Forestry*, 325 Or. 185, 935 P.2d 411 (1997).[2]

On remand, Boise dropped its claim under the Oregon Constitution and proceeded only on its federal constitutional claim. Boise moved for partial summary judgment, and the trial court ruled as a matter of law that a regulatory taking had occurred. The question of damages was tried to a jury, as was a question as to whether a taking by "physical invasion" had occurred. Meanwhile, one of the spotted owls on the Walker Creek site had died and the other had left the site, and all restrictions on logging the site were lifted. The jury returned a verdict for Boise, and the trial court entered judgment for Boise in the amount of $2,279,223 in damages for the temporary restriction on its logging of the Walker Creek site. This appeal ensued.

On appeal, the state makes numerous arguments that the trial court erred in failing to dismiss the claim, in granting partial summary judgment, in limiting the state's evidence, in instructing the jury, and in various other regards. We turn first to the state's argument that the trial court lacked jurisdiction by reason of the Eleventh Amendment to the United States Constitution.

The state argues that there is no direct right of action under the Fifth and Fourteenth Amendments to the United States Constitution against the state in a state court. The state maintains that, although Congress can, and has, abrogated the states' immunity from suit by way of its power to enforce the Fourteenth Amendment, Boise has not pleaded its case under any statute that abrogates the state's immunity, *e.g.*, 42 USC section

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[2] The court's decision covered other subjects as well, but they are not pertinent to this appeal.

1983. Although the state acknowledges that a number of takings claims under the federal constitution have proceeded in Oregon courts throughout the years, it argues that the sovereign immunity question was not raised and thus was not addressed in those cases.

Boise responds that, although the Eleventh Amendment may bar plaintiffs from pursuing federal constitutional claims against states in federal court, it "has nothing to do with barring a plaintiff from bringing a takings claim against the State, based on the federal constitution, in the Oregon courts[.]" Until quite recently, Boise's position on this question seemed unassailable. *See, e.g., Hilton v. South Carolina Public Railways Com'n*, 502 U.S. 197, 204-05, 112 S.Ct. 560, 116 L.Ed.2d 560 (1991) ("But as we have stated on many occasions, 'the Eleventh Amendment does not apply in state courts.'"). However, in a recent series of cases, the United States Supreme Court has significantly altered its position on the question of states' sovereign immunity. Most directly on point is *Alden v. Maine*, 527 U.S. 706, 119 S.Ct. 2240, 144 L.Ed.2d 636 (1999), which concerned an attempt by state employees to enforce the Fair Labor Standards Act (FLSA), 29 USC section 201 et seq., against the state in a state court proceeding. Although the FLSA contains a provision purporting to authorize actions against states in their own courts, the Court held that "the powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state courts." 119 S.Ct. at 2246.

The Court first acknowledged that the text of the Eleventh Amendment does not actually address the question of when a state may be sued in its own courts.[3] *Id.* However, after

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[3] The Eleventh Amendment to the United States Constitution provides:

reviewing at length the history of the Tenth and Eleventh Amendments, and its own earlier case law upholding the states' "sovereign immunity in various contexts falling outside the literal text of the Eleventh Amendment," *id.* at 2253, the Court concluded that basing decisions concerning states' immunity on the text of the amendment alone would constitute "ahistorical literalism[.]" *Id.* at 2254. Although acknowledging Congress's power to enact legislation such as the FLSA via the Commerce Clause, the Court concluded that Congress did not have the power to abrogate states' sovereign immunity in doing so. *Id.*

The Court went on to indicate, though, that sovereign immunity would "not bar all judicial review of state compliance with the Constitution[.]" *Id.* at 2266. In particular, the Court pointed out:

> "We have held also that in adopting the Fourteenth Amendment, the people required the States to surrender a portion of the sovereignty that had been preserved to them by the original Constitution, so that Congress may authorize private suits against nonconsenting States pursuant to its § 5 enforcement power. *Fitzpatrick v. Bitzer*, 427 U.S. 445[, 96 S.Ct. 2666, 49 L.Ed.2d 614] (1976). By imposing explicit limits on the powers of the States and granting Congress the power to enforce them, the Amendment 'fundamentally altered the balance of state and federal power struck by the Constitution.' *Seminole Tribe [of*

"The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

> *Fla. v. Florida*, 517 U.S. 44, 59, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996)]. When Congress enacts appropriate legislation to enforce this Amendment, *see City of Boerne v. Flores*, 521 U.S. 507[, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997)], federal interests are paramount, and Congress may assert an authority over the States which would be otherwise unauthorized by the Constitution. *Fitzpatrick, supra*, at 456 [96 S.Ct. 2666]." *Alden*, 119 S.Ct. at 2267.

In summary, the Court has declared that, even if a state has not waived its sovereign immunity, Congress may, pursuant to the enforcement power granted it by section 5, of the Fourteenth Amendment,[4] enact legislation to enforce constitutional rights that have been made applicable to the states through the Fourteenth Amendment. It is not disputed that the just compensation clause of the Fifth Amendment applies to the states through the Fourteenth Amendment. The question, then, is whether plaintiff's only remedy for the constitutional violation it alleges is through a positive enactment of Congress, such as 42 USC section 1983, as the state posits.

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[4] The Fourteenth Amendment to the United States Constitution provides, in part:

> "Section 1. * * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> " * * * * *
>
> "Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

The parties cite no provision other than 42 USC section 1983 as an affirmative act of Congress that would abrogate the states' sovereign immunity and subject it to takings claims in state courts, and we are aware of none.[5] However, we do not find the state's answer to this issue--that plaintiff failed to state a claim because it did not proceed under 42 USC section 1983--to be satisfactory. Section 1983 actions may be brought against "persons," but a state is not a "person" for purposes of section 1983. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 64, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989). As noted above, though, the Fourteenth Amendment provides that no "*state* [shall] deprive any person of * * * property, without due process of law," and the Fifth Amendment, incorporated as to the states through the Fourteenth Amendment, calls for "just compensation" for a taking of property. (Emphasis added.) In short, section 1983 does not provide for the remedy required by the constitution for a taking of property by the *state*.

Thus, the question comes down to whether Boise can maintain an inverse condemnation action against the state in state court, based on an alleged violation of the Fifth Amendment to United States Constitution, in the absence of congressional action pursuant to section five of the Fourteenth Amendment authorizing such an action. As a general matter, the *Alden* decision discussed above might suggest that the answer is "no," because of its emphasis on positive acts of Congress under section five of the Fourteenth Amendment. However, certain language in the *Alden* decision, particularly when read in conjunction with some of the Court's earlier case law describing

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[5] The state concedes that Congress has authority to subject it to suit in state court without its consent. We recognize that *Alden* may well be read to indicate otherwise, but we will treat the state's concession in this case as a partial waiver of any sovereign immunity defense that it is immune from suit in state court even if Congress has the authority to subject it to suit in federal court.

the Fifth Amendment as "self-executing," casts doubt on such a conclusion. In *Alden*, the Court distinguished the issue before it from the issue presented in *Reich v. Collins*, 513 U.S. 106, 115 S.Ct. 547, 130 L.Ed.2d 454 (1994):

> "In *Reich v. Collins*, 513 U.S. 106 [115 S.Ct. 547, 130 L.Ed.2d 454] (1994), we held that, despite its immunity from suit in federal court, a State which holds out what plainly appears to be a 'clear and certain' postdeprivation remedy for taxes collected in violation of federal law may not declare, after disputed taxes have been paid in reliance on this remedy, that the remedy does not in fact exist. *Id.* at 108 [115 S.Ct. 547]. This case arose in the context of tax-refund litigation, where a State may deprive a taxpayer of all other means of challenging the validity of its tax laws by holding out what appears to be a 'clear and certain' postdeprivation remedy. *Ibid.*; *see also Fair Assessment in Real Estate Assn., Inc. v. McNary*, 454 U.S. 100[, 102 S.Ct. 177, 70 L.Ed.2d 271] (1981). *In this context, due process requires the State to provide the remedy it has promised. Cf. Hudson v. Palmer*, 468 U.S. 517, 539[, 104 S.Ct. 3194, 82 L.Ed.2d 393] (1984) (O'Connor, J., concurring). *The obligation arises from the Constitution itself; Reich* does not speak to the power of Congress to subject States to suits in their own courts." *Alden*, 119 S.Ct. at 2259 (emphasis added).

Although Reich has little direct bearing on the issue before us, as it did not involve any issues of sovereign immunity, the Court's description of *Reich* in *Alden* strongly suggests that states may be required to provide promised remedies in state court proceedings by force of the Due Process Clause alone.

Further support for this idea that the Constitution itself may dictate the availability of remedies in state court under

certain circumstances can be found in *First Lutheran Church v. Los Angeles County*, 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987). Although *First Lutheran* did not squarely present the type of sovereign immunity issue with which we are confronted, it provides significant guidance on the issue. In *First Lutheran*, the plaintiff sued a county after it adopted an interim ordinance that temporarily banned construction within a flood zone. 482 U.S. at 307- 08, 107 S.Ct. 2378. The focus of the case was whether a temporary regulatory taking constituted a taking under the Fifth Amendment. It does not appear from the text of the opinion that a sovereign immunity defense was raised. However, the Solicitor General, an *amicus* in the case, did make a sovereign immunity argument that the Court addressed:

> "We have recognized that a landowner is entitled to bring an action in inverse condemnation as a result of 'the self-executing character of the constitutional provision with respect to compensation * * *.' *United States v. Clarke*, 445 U.S. 253, 257, 100 S.Ct. 1127, 63 L.Ed.2d 373 (1980), quoting 6 P. Nichols, *Eminent Domain* § 25.41 (3d rev ed 1972). As noted in Justice Brennan's dissent in *San Diego Gas & Electric Co.*, 450 U.S. [621], 654-55, 101 S.Ct. 1287, 67 L.Ed.2d 551 [(1981)], it has been established at least since *Jacobs v. United States*, 290 U.S. 13, 54 S.Ct. 26, 78 L.Ed. 142 (1933), that claims for just compensation are grounded in the Constitution itself:
>
> > "'The suits were based on the right to recover just compensation for property taken by the United States for public use in the exercise of its power of eminent domain. *That right was guaranteed by the Constitution.* The fact that condemnation proceedings were not instituted and that the right was asserted in suits by the owners did not change the essential nature of the

> claim. The form of the remedy did not qualify the right. It rested upon the Fifth Amendment. Statutory recognition was not necessary. A promise to pay was not necessary. Such a promise was implied because of the duty to pay imposed by the Amendment. *The suits were thus founded upon the Constitution of the United States.*' *Id.* at 16, 54 S.Ct. 26, 78 L.Ed. 142. (Emphasis added [by *First Lutheran* court]).'

"*Jacobs*, moreover, does not stand alone, for the Court has frequently repeated the view that, in the event of a taking, the compensation remedy is required by the Constitution. *See, e.g., Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1, 5, 104 S.Ct. 2187, 81 L.Ed.2d 1 (1984); *United States v. Causby*, 328 U.S. 256, 267, 66 S.Ct. 1062, 90 L.Ed. 1206 (1946); *Seaboard Air Line R. Co. v. United States*, 261 U.S. 299, 304-306, 43 S.Ct. 354, 67 L.Ed. 664 (1923); *Monongahela Navigation [Co. v. United States*, 148 U.S. 312, 13 S.Ct. 622, 37 L.Ed. 463 (1893).[9]

---

[9] "The Solicitor General urges that the prohibitory nature of the Fifth Amendment * * * combined with principles of sovereign immunity, establishes that the Amendment itself is only a limitation on the power of Government to act, not a remedial provision. The cases cited in the text, we think, refute the argument of the United States that 'the Constitution does not, of its own force, furnish a basis for a court to award money damages against the government.' Brief for United States as *Amicus Curiae* 14. Though arising in various factual and jurisdictional settings, these cases make clear that it is the Constitution that dictates the remedy for interference with property rights amounting to a taking. *See San Diego Gas & Electric Co. v. San Diego*, 450

U.S. 621, 655 n. 21, 101 S.Ct. 1287, 67 L.Ed.2d 551 (1981) (Brennan, J., dissenting), quoting *United States v. Dickinson*, 331 U.S. 745, 748, 67 S.Ct. 1382, 91 L.Ed. 1789 (1947)." *First Lutheran*, 482 U.S. at 315-16, 316 n. 9, 107 S.Ct. 2378.

Piecing together the Court's various statements in *First Lutheran* with its description of *Reich* in *Alden*, we conclude that the Court, in its recent Eleventh Amendment decisions, did not intend to abandon the notion that at least some constitutional claims are actionable against a state, even without a waiver or congressional abrogation of sovereign immunity, due to the nature of the constitutional provision involved. We recognize that our conclusion on this point is not beyond dispute. *See, e.g., Azul-Pacifico, Inc. v. City of Los Angeles*, 973 F.2d 704, 705 (9th Cir.1992), *cert. den.* 506 U.S. 1081, 113 S.Ct. 1049, 122 L.Ed.2d 357 (1993) (Takings plaintiff had "no cause of action directly under the United States Constitution. We have previously held that a litigant complaining of a violation of a constitutional right must utilize 42 USC 1983[.]"). However, particularly in light of the Court's rejection of the *amicus curiae's* sovereign immunity argument in *First Lutheran*, and in light of the fact that the state has explicitly disavowed any reliance on *Alden* in the present case, we conclude that *Alden* should not be read so broadly as to dictate that states may not be sued in state courts on federal takings claims unless they have specifically waived their sovereign immunity. We conclude that, because of the "self-executing" nature of the Fifth Amendment, as applied to the states through the Fourteenth Amendment, a state may be sued in state court for takings in violation of the federal constitution.

The state next argues that the trial court erred in denying its motion to dismiss for failure to state a claim under either of two theories: the *Lucas* theory (deprivation of all beneficial use of property) and the *Loretto* theory (physical occupation of

property). *See generally Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982). To state a claim under the Fifth Amendment for a taking under a *Lucas* theory, the property owner must allege that a governmental action has deprived the owner of all economically beneficial use of the property. Both this court and the Oregon Supreme Court concluded that plaintiff had stated a claim under this type of theory in the course of the previous appeal. *See Boise Cascade*, 131 Or.App. at 551, 886 P.2d 1033 ("plaintiff alleges, in essence, that the government has regulated its property in such a way that productive uses are unavailable and all viable economic and beneficial use has been eliminated. Those allegations suffice to state regulatory taking claims under * * * *Lucas*"); *Boise Cascade*, 325 Or. at 198, 935 P.2d 411 (Plaintiff's allegations were "sufficient to meet the 'deprivation of all economically viable use of the property' standard. The Court of Appeals was correct in so holding."). Although plaintiff amended its pleadings after remand, the amended pleadings, insofar as the *Lucas* theory of recovery is concerned, are much the same as its pleadings discussed in the previous appellate decisions in this case. Plaintiff alleged that the state has regulated its property in such a way that all viable economic and beneficial use of the property was eliminated. The trial court properly denied the state's motion to dismiss on the ground that plaintiff failed to state a claim under the *Lucas* theory.

The state also moved to strike plaintiff's allegations that it had suffered a *per se* taking by means of a "permanent physical occupation" in violation of the Fifth Amendment. In its complaint, plaintiff alleged that the administrative rules described above required plaintiffs to maintain spotted owl nests and prevent their abandonment so the nests could be occupied annually by a pair of breeding owls and that the state's denial of plaintiff's plan to harvest the timber constituted a *per se* taking.

The *Loretto* case concerned "whether a minor but permanent physical occupation of an owner's property authorized by government constitutes a 'taking' of property for which just compensation is due under the Fifth and Fourteenth Amendments." 458 U.S. at 421, 102 S.Ct. 3164. The state argues that the court erred in denying its motion to strike this count of plaintiff's claim because plaintiff has not alleged the type of physical occupation at issue in *Loretto*. We agree.

In *Loretto*, the challenged statute required landlords to permit cable television companies to install devices on their property. *Id.* There, the Court recounted at length the historic distinctions between takings involving permanent physical invasion of property and regulations that place restrictions on the use of property. 458 U.S. at 427-35, 102 S.Ct. 3164. One of the early physical invasion cases that the Court discussed in *Loretto* was *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall) 166, 20 L.Ed. 557 (1871), in which the Court held that "where real estate is actually invaded by *superinduced* additions of water, earth, sand or other material, or by having any *artificial* structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking[.]" (Emphasis added.) *Pumpelly* involved a situation where the government *caused* a party's land to become flooded. However, the Court's "physical occupation" jurisprudence in no way suggests that the same takings analysis would apply where, for example, a natural flood occurred and government regulations pertained to how a landowner was to deal with floodwaters on his or her land. *Compare Pumpelly*, 80 U.S. at 177-78 (where government caused property to flood by constructing a dam, there was a taking by "physical occupation"), *with First Lutheran*, 482 U.S. at 308, 107 S.Ct. 2378 (where flood occurred as a consequence of a forest fire destroying a watershed area, government regulation of construction within flood zone was analyzed under regulatory takings case law).

As the state points out, there are significant differences between a government authorizing or conducting a physical invasion of the property of another and a government regulating what one may do with property due to the random or incidental location of a natural resource or wild animal on the property. The state has no control over where spotted owls choose to nest. The natural occurrence of a pair of breeding spotted owls on a piece of property is more akin to the naturally occurring flood in our hypothetical described above than to a flood caused by the government's construction of a dam, as was the case in *Pumpelly*, or to the installation of an artificial structure such as a cable television box, as was the case in *Loretto*.

The state did not cause or induce the spotted owls to breed on plaintiff's property. The state simply regulated plaintiff's use of the property based on the presence of the spotted owls there. Although plaintiffs have stated a claim for a regulatory taking, they have not stated a claim for a "physical occupation" taking under *Loretto*. The trial court erred in concluding otherwise.

However, that conclusion does not end our inquiry. As noted, plaintiff pleaded two theories in alternative counts as part of its takings claim. Although the court should have stricken the *Loretto* count, it properly denied the state's motion to dismiss the regulatory taking count. As noted above, the trial court granted plaintiff summary judgment on its regulatory taking count and submitted the *Loretto* count to the jury. In response to a separate question, the jury also determined damages, but it is undisputed that the damages under either theory would be the same. Thus, although the submission of plaintiff's *Loretto* theory to the jury was erroneous, the jury's damage award nevertheless was proper if the trial court correctly decided the regulatory taking question. This is not a situation where we cannot tell what theory the jury followed in reaching its conclusion. *Cf. Whinston v. Kaiser Foundation Hosp.*, 309 Or. 350, 357, 788 P.2d 428 (1990)

(where more than one theory is submitted to the jury and some are unsupported by the evidence, but it cannot be determined on which allegation the jury based its verdict, a new trial must be granted). Only one theory of liability was before the jury here, and even though it was not properly before the jury, the damages question, which applied in the same manner to both takings theories, was properly before the jury and would have been properly before the jury even if the trial court had correctly stricken the *Loretto* count from plaintiff's takings claim. We therefore turn to the pleading issues pertaining to the regulatory taking claim.

The state argues that the trial court erred in striking its defense that Boise's proposed logging would constitute a nuisance and that the state cannot be liable for refusing to permit Boise to perform acts that constitute a nuisance and violate the law. In *Lucas*, the Court noted that there would be no taking if "the proscribed use interests were not part of [the property owner's] title to begin with." 505 U.S. at 1027, 112 S.Ct. 2886. The Court further noted that such limitations "must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." *Id.* at 1029, 112 S.Ct. 2886. The state's defense at issue here appears to rest on this part of the *Lucas* case.

The state offers no authority for the proposition that knocking down a bird's nest on one's property has ever been considered a public nuisance. The case on which it relies, *Columbia Fishermen's Union v. St. Helens*, 160 Or. 654, 87 P.2d 195 (1939), concerned a suit by fishermen to enjoin the city of St. Helens from dumping raw sewage into the Columbia River--a practice which, needless to say, was detrimental to the fish population on which the fishermen depended for their livelihoods. That case concluded that the fisherman had standing to maintain an action against the city. *Id.* at 666, 87 P.2d 195.

However, any analogy to the present case is less than clear. The court in *Columbia* indicated that the state could protect its navigable waters from pollution because it had an interest in *ferae naturae* (the fish) in the waters. It does not follow, as the state seems to posit, that any act taken by the state to protect *ferae naturae* on private property is the equivalent to an abatement of a public nuisance or, alternatively, any act by a private party to destroy *ferae naturae* on private property constitutes a public nuisance. *Cf. State Dept. of Env. Qual. v. Chem. Waste*, 19 Or.App. 712, 719, 528 P.2d 1076 (1974) ("defendant has been 'operating' the site in violation of the Environmentally Hazardous Wastes Statutes from the time they became effective in early 1972, [but] that continuing violation does not require a finding that the site constitutes a public nuisance"). The trial court correctly struck the state's defense that plaintiff's proposed logging constituted a public nuisance.

In its final assignment of error concerning the pleadings, the state argues that the trial court erred in striking its defense that it labeled as "failure to exhaust its administrative remedies." The state argues that Boise's regulatory takings claim is unripe because it did not make an effort to obtain an "incidental take" permit pursuant to 16 USC section 1539(a). *Former* OAR 660-24-809(5) provided that "[e]xceptions to the requirements for protecting northern spotted owl nesting sites may be approved by the State Forester if the operator has obtained an incidental take permit from federal authorities under the federal Endangered Species Act." The state argues that, because plaintiff did not attempt to avail itself of this exception, it may not yet assert a takings claim. The trial court granted Boise's motion to strike this defense without stating its reason for doing so. We therefore examine all of the arguments made to the trial court on this issue in order to determine if the trial court erred in striking this defense.

As an initial matter, Boise correctly points out that the state's argument is not so much an exhaustion of remedies argument as it is a ripeness argument. However, the terminology used in the caption is not dispositive here, as the parties clearly addressed the issue in the lower court as a ripeness issue, and Boise does not contend that the state failed to preserve this issue. We do not consider a mislabeling of a caption in the pleadings to be dispositive where the body of the pleading adequately describes the nature of the defense that is being asserted. *See Curran v. ODOT*, 151 Or.App. 781, 786 n. 4, 951 P.2d 183 (1997) (concluding under similar circumstances that ripeness issue was preserved).

Both parties agree that the relevant concept is laid out in the Court's decision in *Williamson Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985).[6] In *Williamson*, the plaintiff sought to develop certain property based on the preliminary approval of a plat map that had been obtained by its predecessor in interest. The planning commission disapproved the development because it failed to comply with numerous zoning ordinances. *Id.* at 176-83, 105 S.Ct. 3108. Rather than applying for variances from the zoning ordinances, the plaintiff sought just compensation under the Fifth Amendment. The Court looked to its earlier cases, *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 101 S.Ct. 2352, 69 L.Ed.2d 1 (1981), and *Agins v. Tiburon*, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980), stating that

> "a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the

---

[6] In *Williamson*, the Court explained the distinction between "exhaustion of remedies" and "ripeness" as follows:

> regulations has reached a final decision regarding the application of the regulations to the property at issue." *Williamson*, 473 U.S. at 186, 105 S.Ct. 3108.

The Court quoted from *Hodel*:

> "There is no indication in the record that appellees have availed themselves of the opportunities provided by the Act to obtain administrative relief by requesting either a variance * * * or a waiver * * *[.] If [the property owners] were to seek administrative relief under these procedures, a mutually acceptable solution might well be reached with regard to individual properties, thereby obviating any need to address the constitutional questions. The potential for such administrative solutions confirms the conclusion that the taking issue * * * simply is not ripe for judicial resolution." 452 U.S. at 297, 101 S.Ct. 2352.

The *Williamson* Court went on to note that, in *Agins*, the property owners had submitted a plan that was disapproved but, as they had not sought approval of any other type of plan, it "was not clear whether the Commission would deny approval for all uses that would enable the plaintiffs to derive economic benefit from the property." 473 U.S. at 187, 105 S.Ct. 3108. The *Williamson* Court concluded that the claim was unripe for the same reason that the claim in *Hodel* was unripe: had the plaintiff

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"While the policies underlying the two concepts often overlap, the finality requirement is concerned with whether the initial decision-maker has arrived at a definitive position on the issue that inflicts an actual, concrete injury; the exhaustion requirement generally refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate."

sought and obtained available variances and waivers, the parties might have reached a mutually acceptable solution. *Id.* at 188-90, 105 S.Ct. 3108; *cf. Curran v. ODOT*, 151 Or.App. at 787, 951 P.2d 183 (addressing ripeness problem under Article I, section 18, of the Oregon Constitution, the court concluded that plaintiff's failure to apply for a permit that could have obviated "takings" meant that plaintiff's claim was not ripe); *Larson v. Multnomah County*, 121 Or.App. 119, 122, 854 P.2d 476, *adhered to on recons*. 123 Or.App. 300, 859 P.2d 574 (1993) (recognizing rule that if a landowner has unsuccessfully filed an application but has pursued no alternatives that could lead to approval, a takings claim is unripe).

The state maintains that plaintiff's claim suffers the same flaw as did the claims of the plaintiffs in *Williamson* and *Hodel*. The state argues that plaintiff's failure to seek an "incidental take" permit from the United States Fish and Wildlife Service pursuant to 16 USC section 1539(a), which is a prerequisite to any variance under *former* OAR 660-24-809(5) for destruction of northern spotted owl habitat, creates a ripeness problem similar to the ripeness problems of the plaintiffs in *Williamson* and *Hodel* due to their failure to seek variances that could have obviated the problem.

Boise responds by making several points. First, it notes that it is undisputed that, even if Boise had obtained an incidental take permit from the United States Fish and Wildlife Service, the state would not have been obliged to approve Boise's logging plan. That is true; under *former* OAR 660- 24-809(5), an incidental take permit is a prerequisite to state approval of a logging plan that destroys spotted owl habitat, but an incidental take permit does not, in itself, guarantee that the logging plan will be approved. However, nothing in *Williamson*, *Hodel* or *Agins* implies that a waiver or variance must be a "sure thing" in order for a plaintiff to be required to pursue such a remedy before bringing a takings claim.

Boise also suggested, in the course of its arguments on this issue to the trial court, that no incidental take permit would have been required in any event, for several reasons. First, Boise asserted that the Endangered Species Act only prohibits "taking" an endangered species, and destroying an endangered species' habitat does not fall within the definition of "take":

> "The term 'take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct." 16 USC Section 1532(19).
>
> We disagree with plaintiff's assertion that the definition of "take" does not encompass destruction of habitat. In *Babbitt v. Sweet Home Chapter, Etc.*, 515 U.S. 687, 115 S.Ct. 2407, 132 L.Ed.2d 597 (1995), the Court upheld an Interior Department rule that defined "harm" as including destruction of endangered species' habitat. *See also Palila v. Hawaii Dept. of Land and Natural Resources* (*Palila II*), 852 F.2d 1106, 1108 (9th Cir.1988) (same).

Boise also suggested in the trial court that, because the United States Department of Fish and Wildlife had enacted a regulation defining critical habitat for the spotted owl on federal lands but not on private land, Boise somehow was exempted from any requirement that it acquire an "incidental take" permit before taking owls on its private property. Boise argued:

> "[T]he USF & WS had published in the Federal Register its own regulations governing the Northern Spotted Owl. 57 Fed Reg 1796-01 (Jan 15, 1992 WL4601 (F.R.)). In that document it defined the critical habitat for the bird's recovery. It made a specific finding that private lands were not included in critical habitat, even where the surrounding federal lands had been so designated.

> Clatsop County contains no federal critical habitat areas for the Northern Spotted Owl and even the more than 100,000 acres of State commercial timberlands in the county have not been so designated."

It is unsurprising that the regulation found at 57 Fed Reg 1796 (Jan 15, 1992) referred only to critical habitat on federal lands, given that the regulation pertains only to section 7 of the Endangered Species Act, which is a section that sets forth the obligations of federal agencies in protecting endangered species. The prohibition on "*any person*" taking an endangered species, by contrast, is contained in section 9 of the Act,[7] which has a broader application that Section 7. The "incidental take" provisions are cross-referenced in section 1538, which pertains to "any person." The "incidental take" provisions are not limited to federal agency protection of endangered species under section 7. The summary of the regulation itself stated: "This critical habitat designation provides *additional* protection requirements under section 7 of the Act with regard to activities that are funded, authorized, or carried out by a Federal agency." 57 Fed Reg 1796 (Jan 15, 1992) (emphasis added). We conclude that this regulation has no direct bearing on whether Boise was excused,

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[7] 16 USC Section 1538(1) provides, in part:

> "(a) Generally:
>
> "(1) Except as provided in sections 1535(g)(2) and 1539 of this title, with respect to any endangered species of fish or wildlife listed pursuant to section 1533 of this title it is unlawful for any person subject to the jurisdiction of the United States to -
>
> " * * * * *
>
> "(B) take any such species within the United States or the territorial sea of the United States[.]"

as a matter of law, from seeking an incidental take permit under the Endangered Species Act as a prerequisite to the ripening of its takings claim against the state.[8]

Finally, Boise has suggested that it may be inferred from one of its trial exhibits that the state as much as admitted that it would not have approved Boise's logging plan even if Boise had applied for an incidental take permit. We understand Boise's argument to be an invocation of the "futility" exception to the ripeness requirement. *See generally Larson*, 121 Or.App. at 122, 854 P.2d 476 (describing "futility" exception).

For two reasons, either of which is independently dispositive, we reject Boise's assertion of futility. First, the question before us is whether the trial court erred in striking the state's defense on the pleadings; that question cannot be answered by reference to a trial exhibit that might, as a factual matter, be determinative of whether the state *prevailed* on that defense. Second, assuming for the sake of argument that that were not the case, the trial exhibit to which Boise refers does not indicate that it would be futile for Boise to obtain an incidental take permit. Rather, it indicates that the state's decision would not depend solely on the issuance of such a permit and that a decision by the federal government that such a permit was not required would not satisfy the Oregon administrative rule. One of the state's trial exhibits, on the other hand, is a letter of advice to Boise from the Assistant Regional Director of the United States

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[8] It is possible that the designation of critical habitat on federal lands could, in fact, affect whether or how incidental take permits are granted for taking endangered species on private lands. That, however, has no bearing on whether the state's defense based on Boise's failure to even attempt to get an incidental take permit should have been stricken from the pleadings.

Department of the Interior Fish and Wildlife Service indicating that "an incidental take permit is required when otherwise lawful activities will incidentally take a threatened species" and suggesting that they should visit the proposed logging site, after which the agency "should be better able to discuss the situation and advise you regarding [an] incidental take permit." Neither of these trial exhibits, alone or together, indicate that it would have been futile for Boise to pursue an incidental take permit. We conclude that none of Boise's arguments in support of its motion to strike the state's defense that the claim was not ripe are meritorious. The trial court erred in striking the state's defense.

Because of our disposition of this assignment of error, we need not reach the state's numerous assignments of error pertaining to the conduct of the trial.

Reversed and remanded.

IN THE COURT OF APPEALS
OF THE STATE OF OREGON

BOISE CASCADE CORPORATION, a Delaware corporation,	)	Clatsop County Circuit Court No. 93-2018
Plaintiff-Respondent,	)	
v.	)	CA A100855
STATE OF OREGON, by and through the Oregon State Board of Forestry,	)	**ORDER DENYING PETITION FOR RECONSIDERATION**
Defendant-Appellant.	)	

Appellant has filed a petition for reconsideration of the Court's decision dated November 10, 1999, pursuant to ORAP 6.25. Opposing counsel has filed an objection to the petition.

The petition is denied.

/s/ Paul J. De Muniz
PAUL J. DE MUNIZ
PRESIDING JUDGE

MAR 15 2000
DATE

c: David F. Coursen
Phillip D. Chadsey
Daniel H. Kearns
John M. Groen

REPLIES SHOULD BE DIRECTED TO THE STATE COURT ADMIN., RECORDS SECTION, SUPREME COURT BLDG., 1163 STATE ST., SALEM, OR 97310

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IN THE SUPREME COURT
OF THE STATE OF OREGON

BOISE CASCADE CORPORATION, a Delaware corporation,	)	Clatsop County Circuit Court No. 93-2018
Plaintiff-Respondent, Petitioner on Review,	)	
	)	SC S47459
v.	)	CA A100855
STATE OF OREGON, by and through the Oregon State Board of Forestry,	)	
Defendant-Appellant, Respondent on Review.	)	ORDER DENYING REVIEW

Upon consideration by the court.

The Court has considered the petition for review and ORDERS that it be denied.

Dated this 24th day of October 2000.

/s/ Wallace P. Carson Jr.
WALLACE P. CARSON JR.
CHIEF JUSTICE

Kulongoski, J., not participating

c: Phillip D. Chadsey
David Farris Coursen
John M. Groen

S47459-Den.wpd

Paula J. Brownhill, Circuit Judge
(503) 325-8555

Philip L. Nelson, District Judge
(503) 325-8536

CIRCUIT/DISTRICT COURT OF THE
STATE OF OREGON
FOR THE COUNTY OF CLATSOP
Clatsop County Courthouse
749 Commercial
PO Box 659
Astoria, OR 97103

October 16, 1997

Phillip D. Chadsey
Attorney at Law
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Re: *Boise Cascade Corporation vs. State of Oregon*
Case No. 93-2018

Gentlemen:

I ruled on several motions at the September 22, 1997 hearing. Mr. Chadsey submitted an order reflecting those rulings on September 30, 1997. I signed it today and directed the clerk to file the second amended complaint and answer.

There are two matters under advisement. I will deny defendant's supplemental Rule 21 motion to dismiss for failure to state a claim. I will allow plaintiff's motion for partial summary judgment on Count 3 of the amended complaint. Mr. Chadsey, please prepare an order that reflects these rulings.

Yours truly,

/s/ Paula Brownhill

Paula Brownhill

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TRIAL COURT ADMINISTRATOR

IN THE CIRCUIT COURT
FOR THE STATE OF OREGON
COUNTY OF CLATSOP

BOISE CASCADE CORPORATION, a Delaware corporation, Plaintiff, v. STATE OF OREGON, by and through the OREGON STATE BOARD OF FORESTRY, Defendant.	Case No. 93-2018 SPECIAL INTERROGATORY VERDICT

We, the Jury, find:

1. Was plaintiff Boise Cascade Corporation required to submit to a physical occupation of its property as a result of the Board of Forestry's order denying its written plan to log the subject property from January 15, 1993?

ANSWER: Yes X **No** ____

Proceed to question 2.

2. On January 15, 1993, what was the fair market value of the timber that plaintiff was unable to log due to the Board of Forestry's order?

ANSWER: $2,279,233

Proceed to question 3.

3. On October 17, 1997, what was the fair market value of the timber?

ANSWER: $1,615,425

DATED November 21, 1997.

/s/ Constance Bourquein
Presiding Juror

FILED
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By /s/ unreadable

IN THE CIRCUIT COURT
OF THE STATE OF OREGON
FOR THE COUNTY OF CLATSOP

BOISE CASCADE, a Delaware corporation,	
Plaintiff,	No. 93-2018
v.	JUDGMENT
STATE OF OREGON, by and through the OREGON STATE BOARD OF FORESTRY,	
Defendant.	

Pursuant to the order of dismissal entered in this case on April ____, 1993 and incorporated herewith, it is ORDERED:

1. Judgment is hereby entered in favor of defendant.

2. Plaintiff's Supplemental Complaint is dismissed with prejudice.

3. Costs shall be determined subsequently pursuant to ORCP 68.

Dated this 30 day of April, 1993.

/s/ Thomas E. Edison
Thomas E. Edison
Circuit Court Judge

PRESENTED BY:
Phillip D. Chadsey, OSB No. 66028
Of Attorneys for Plaintiff

BOISE CASCADE CORPORATION, a Delaware corporation, Appellant,

v.

BOARD OF FORESTRY, Respondent.

93-2018; CA A79626.

Appeal from Circuit Court, Clatsop County
Thomas E. Edison, Judge

Court of Appeals of Oregon.
886 P.2d 1033 (Or. App. 1999)

Argued and Submitted July 15, 1994.
Decided Dec. 7, 1994.

Phillip D. Chadsey, Portland, argued the cause for appellant. With him on the briefs was Stoel Rives Boley Jones & Grey.

Virginia L. Linder, Sol. Gen., argued the cause for respondent. With her on the brief were Theodore R. Kulongoski, Atty. Gen. and John T. Bagg, Asst. Atty. Gen.

Before ROSSMAN, P.J., and De MUNIZ and LEESON, JJ.

De MUNIZ, Judge.

Reversed and Remanded.

Plaintiff appeals from the judgment for defendant Board of Forestry ("board") in this inverse condemnation action arising out of the board's refusal to permit logging operations on

plaintiff's property in which a spotted owl nesting site is located. Plaintiff contends that the board's refusal gives rise to an uncompensated taking of its property in violation of the Fifth Amendment to the federal constitution and Article I, section 18, of the state constitution. The trial court granted the state's ORCP 21 motion to dismiss on the grounds that the court lacked subject matter jurisdiction, that the action was not ripe and that plaintiff's complaint[1] failed to state takings claims. We disagree with the trial court that the motion to dismiss was properly granted on any of those grounds, and we reverse and remand.

For purposes of reviewing the granting of a motion to dismiss for failure to state a claim under ORCP 21A(8), we take as true the allegations in the complaint, along with any facts that might be adduced to prove the allegations. *Doyle v. Oregon Bank*, 94 Or.App. 230, 232, 764 P.2d 1379 (1988), *rev. den.* 307 Or. 571, 771 P.2d 1021 (1989).[2] With two exceptions that we will discuss below, the state accepts the statement of facts in plaintiff's opening brief as adequately summarizing the complaint. Accordingly, we take the facts that are material to our discussion from plaintiff's statement:

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[1] We use the generic term "complaint" to refer to the supplemental complaint on which the parties ultimately proceeded.

[2] Although the allegations in the complaint do not play the same definitive role with respect to the jurisdictional issue, *see* ORCP 21A(1), the facts concerning it are undisputed, and it is resolvable solely on legal grounds. Ripeness issues fall in a gray area, in that they are not jurisdictional, and they are *usually* presented as matters of defense. However, the ripeness contentions presented here turn in part on a purely legal question and in part on factual questions that cannot be conclusively answered on the basis of this record--whether inside the complaint or out. It is unnecessary for us to decide whether we may look beyond the complaint to resolve the state's ripeness arguments because, at this stage of the case, they fail whether or not we do.

"Boise Cascade has been the owner of real property in Clatsop County, consisting of approximately 65 acres of commercial timberland, which is known as the 'Walker Creek Unit' * * *. The Walker Creek Unit is the only commercial timberland that plaintiff owns in Clatsop County.

"In October 1988, Boise Cascade acquired the Walker Creek Unit. At that time and all times since, it has been zoned as commercial timberland. The Walker Creek Unit also cannot be developed or used for a commercial purpose that is not authorized by Land Conservation and Development Commission Goal 4 governing forestlands. OAR 660-06-000, et seq. That goal limits commercial activities on such lands to forest operations related to the growing and harvesting of any tree species as defined in ORS 527.620(6) and certain locationally dependent or compatible forest uses. Consistent with that goal, ORS 527.630(1) provides, in part, that 'it is declared to be the public policy of the State of Oregon to encourage economically efficient forest practices that assure the continuous growing and harvesting of forest tree species and the maintenance of forestland for such purposes as the leading use on privately owned land * * *.' At the time plaintiff acquired the subject property and at all times since, the Oregon Threatened or Endangered Wildlife Species Act, (ORS 496.192(1)), has provided, in part, that it was not intended 'to require an owner of any commercial forestland or other private land to take action to protect a threatened species or endangered species, or to impose additional requirements or restrictions on the use of private land.'

"Plaintiff acquired the Walker Creek Unit with the reasonable economic expectation that it could log the existing merchantable timber on the property and replant it with forest tree species in order to provide future merchantable timber harvests from the unit. The existing merchantable timber on the Walker Creek Unit consists of old and second growth Douglas Fir, Western Red Cedar, and Western Hemlock.

"In August 1990, the Oregon State Forester adopted an interim spotted owl policy precluding timber harvest within a 70-acre core area 'of the best available suitable habitat in the vicinity of the [nest] site.' Also in 1990, a pair of spotted owls were found nesting on a tree within the Walker Creek unit. Old growth timber of the kind found on the Walker Creek Unit is considered to be the best suitable habitat for spotted owls. The Board subsequently adopted OAR 629-24-809, which requires protection of a 70-acre core area of suitable habitat encompassing the nest site.

"Commercial timberland, consisting of trees that are 70 years or less in age, is not considered to be the 'best' suitable owl habitat if old growth timber is also available in the vicinity of the nest site. In addition to the pair in the Walker Creek Unit, a number of other pairs of spotted owls have been found in Clatsop County. Some of those nest on State of Oregon-owned timberland that does meet the habitat requirements of OAR 629-24-809. Spotted owls have been found in 50- to 60-year old timber in the Buster Creek drainage in Clatsop County. Several pairs of spotted owls have been found in the Jewell area, which is approximately four air miles from the Walker Creek Unit. Spotted owls, including juveniles when they fledge, will often fly 20 miles or more in order to find new suitable habitat.

"On January 7, 1992, plaintiff filed Notification No. 92-521-11022 giving notice to the Oregon State Forester of its intent to conduct an operation and harvest timber on the Walker Creek Unit. Because of the location of protected waters on or near the Walker Creek Unit and the Walker Creek Unit's identification as spotted owl habitat, a written logging plan was required. Plaintiff filed such a plan on February 4, 1992. The plan provided that, if a pair of owls nested in the operations area in 1992, no operation would be conducted during the critical period of use, March 1 to September 30, or until the young owls had fledged, in order to avoid any incidental harm to the owls

while they were present in the area. That plan was denied approval on February 24, 1992, on the ground that it failed to describe how the operation would be conducted to provide a 70-acre core area of suitable owl habitat consistent with the requirements of OAR 629-24-809.

"On May 5, 1992, plaintiff submitted an amended written logging plan. The amended plan reported that a pair of spotted owls was then known to be nesting in a tree within the harvest area, although it was a different site from the one that had been occupied by a pair of owls in 1990. The amended plan provided that plaintiff would not conduct operations in the area while the owls were present. With respect to the habitat identification requirement, the amended plan specifically provided that there were more than 70 acres of commercial timberland immediately adjacent to the Walker Creek Unit that were owned by the State of Oregon and that could provide habitat for the owls after plaintiff's property had been logged. Except for the subject timber which plaintiff desires to log, there is not sufficient 'suitable spotted owl habitat,' as defined by OAR 629-24-809(1)(a), in the immediate area of the Walker Creek Unit to meet the requirements of that statute. Further, the only known nest trees in the immediate area of the Walker Creek Unit to meet the requirements of that area are located within the unit which plaintiff desires to log. On May 15, 1992, approval of the amended plan was denied. In denying plaintiff's amended plan, the Oregon Department of Forestry identified the core areas consisting of approximately 56 acres of plaintiff's unit, nine acres of another private landowner's timber, and approximately five acres of adjacent timberland owned by the State of Oregon. The Oregon Department of Forestry did advise plaintiff that there were eight acres in its Walker Creek Unit that could be harvested.

"Plaintiff then took a timely appeal of the Oregon Department of Forestry's denial of its amended plan to the

Board. As a basis for that appeal, plaintiff claimed that the Board's requirement that plaintiff set aside any part of its merchantable timber, including the nest trees, for spotted owl habitat constituted a taking of such property for a public purpose which requires just compensation under Article I, section 18, to the Oregon Constitution and the Fifth and Fourteenth Amendments to the United States Constitution. After a contested case hearing was held, on January 6, 1993, the Board refused to waive the 70-acre nest site requirement in order to permit plaintiff to log its Walker Creek Unit, and on January 15, 1993, it entered a final order which affirmed the denial of plaintiff's amended plan. The denial of plaintiff's written plan by the Board was a final administrative action prohibiting plaintiff from logging the subject timber.

"The timber, including the two nest trees, on the Walker Creek Unit which plaintiff desires to log has no economic value unless harvested. The Board's action in denying plaintiff the right to log the Walker Creek Unit has denied it of all economic use of that timber. Apart from the subject merchantable timber, the underlying commercial forestland has no separate economic value until the timber has been logged. After logging and replanting, with young forest tree species as required by law, the land would have a fair market value of $500 per acre.

"Since 1987, when the northern spotted owl was designated as a 'threatened species' pursuant to ORS 496.172, et seq., the State of Oregon has continued to sell its own merchantable timber in Clatsop County for the purpose of having it logged in order to provide revenue to various governmental entities and to manage its commercial timberland for future timber production. The State of Oregon has sold stands of merchantable timber that it owns within 20 miles of plaintiff's Walker Creek Unit even after the Board refused to permit plaintiff to log its merchantable timber.

"After the amended plan was denied approval by the Board in January 1993, on February 22, 1993, plaintiff submitted a written plan No. 93-251-11132 to log four acres of its Walker Creek Unit that the Oregon Department of Forestry had previously agreed could be harvested. On March 8, 1993, the Oregon Department of Forestry approved that plan, subject to the condition that logging operations not begin until October 1, 1993, and end by March 1, 1994, because of the close proximity of those four acres to the spotted owl nest sites in the adjacent core area.

"On March 19, 1993, plaintiff appealed to the Board the temporal condition placed on its right to log the four acres on the basis that the restriction constituted a temporary taking of the subject timber. After a hearing, the Board on April 19, 1993, issued its order refusing to remove the temporal condition which prevents plaintiff from commencing logging operations before October 1, 1993. The Board's action in refusing to remove the temporal condition was a final administrative action which prevents plaintiff from logging its timber in a timely manner.

"Boise Cascade is presently deprived of all economic use of its merchantable timber on the subject four acres."

The two aspects of plaintiff's factual recitation with which the state disagrees are, in the state's words, the allegations that "plaintiff is presently deprived of all economic use of its merchantable timber on land governed by the restriction in OAR 629-24-809," and that the "underlying commercial forestland has no separate economic value until the timber has been logged." The state argues that both allegations are conclusions of law, which should not be considered in determining whether the complaint states a claim. The state also argues that the second allegation is legally wrong, because the timber and the land are not separable property interests, and the land has value notwithstanding regulations on the logging of the timber.

The state is incorrect on both points. The state's argument concerning the separability of the timber and the land is adversely answered by *Hawkins v. City of La Grande*, 315 Or. 57, 70-71, 843 P.2d 400 (1992), and its efforts to distinguish that case do not persuade us. Moreover, for purposes of our review of the motion to dismiss, the point is close to academic: Plaintiff alleges that, if it cannot log the land, the land has no economically viable or beneficial use. In other words, plaintiff alleges that, at least as of now, it has lost all economic and beneficial use of the land, as well as of the timber, by virtue of the restrictions on logging.

The state's second point apparently is premised on the fact that loss of all economically viable or substantial beneficial use of property is the legal test for whether a regulatory taking can be found under the Fifth Amendment and Article I, section 18, respectively. *See Lucas v. South Carolina Coastal Council*, ____ U.S. ___, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992); *Fifth Avenue Corp. v. Washington Co.*, 282 Or. 591, 581 P.2d 50 (1978). However, whether such a loss has occurred is also a factual question, and it is an ultimate question of fact in a regulatory takings case.

Plaintiff's pleading of that fact, coupled with the state's choice to proceed by a motion to dismiss, makes the disposition of this appeal turn on what is alleged in the complaint rather than on what the factual and legal merits of the parties' cases may ultimately prove to be. Many of the state's arguments in this appeal present matters that are outside the complaint. As noted, our review of a motion to dismiss for failure to state a claim starts with the premise that all well-pleaded allegations in the complaint are true, and our review is confined to matters that appear in the complaint. ORCP 21A; *Emmert v. O'Brien*, 72 Or.App. 752, 754, 697 P.2d 222 (1985).

For that reason, at *this* stage of the present case, we are in much the same position that the reviewing courts were in *Lucas v. South Carolina Coastal Council, supra*. As the Oregon Supreme Court observed in *Dodd v. Hood River County*, 317 Or. 172, 183 n. 13, 855 P.2d 608 (1993), the state in *Lucas* "chose not to contest at any level the landowner's allegation that his land had been rendered absolutely worthless" by the regulation in question. Here, the state's motion to dismiss for failure to state a claim concedes plaintiff's corresponding allegation for purposes of the ruling on the motion and of our disposition of the present appeal. The difference between the cases is that, in *Lucas*, the state's failure to deny the contention *at any point* amounted to a confession of ultimate judgment, while in this case the presumption of the allegation's truth extends only to the proceedings on the preliminary motion that is now before us. With the foregoing as prologue, we turn to the parties' specific arguments.

In its first assignment, plaintiff contends that the court erred by ruling that it lacked subject matter jurisdiction. The apparent basis for the ruling, and the principal basis on which the state defends it in this appeal, was that the board's action was taken in the context of a contested case proceeding, and it is subject to exclusive review under applicable provisions of the Administrative Procedures Act (APA). ORS 183.310 *et seq.*; *see* ORS 183.482.[3]

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[3] Plaintiff has sought APA review of the board's orders, and we have issued our decision on those petitions simultaneously with this decision. *Boise Cascade Corp. v. Board of Forestry*, 131 Or.App. 552, 886 P2d 1041 (1994). Some of the jurisdictional arguments we address here appear in the parties' briefs in that case rather than in their presentations in this appeal. However, because the issue is jurisdictional, we are free to consider factors the parties do not raise here, as well as those they do.

The remedy plaintiff seeks here is compensation for the taking that it contends the board's action has occasioned. If all of plaintiff's material allegations are found to be true, its right to that remedy does not depend on whether the board's orders are reversible on direct review. Stated another way, plaintiff does not seek review in this case of what the board *did* but seeks relief for the taking that it maintains the board action has *caused*. Accordingly, plaintiff contends that an inverse condemnation proceeding is not made unavailable on the ground that there is an exclusive APA remedy, because it is not seeking review of the correctness of the board's orders; rather, plaintiff is contending that, right or wrong, the orders impose a regulation that results in a taking. We agree with plaintiff on that aspect of its jurisdictional argument. This action is not part of the administrative process and is not subject to or restricted by the APA. However, the parties' other jurisdictional contentions require more extensive discussion.

Both parties rely on *Dunn v. City of Redmond*, 303 Or. 201, 735 P.2d 609 (1987). The Supreme Court held there that takings claims may be asserted in circuit court inverse condemnation actions, as well as in appeals to the Land Use Board of Appeals (LUBA) from local land use decisions. Each party relies on language in *Dunn* that, read in its selected context, supports the party's position. The state takes the view that *Dunn* supports the proposition that an agency has "primary jurisdiction" to decide whether its regulation gives rise to a taking; only after the agency has made that determination does circuit court authority arise to decide actions that can culminate in monetary relief. According to the state, not until an agency has decided whether a taking would result from its regulatory action can it be appropriate for damages to be considered; up to that point, the agency has the right to change its regulatory decision and thereby avoid both the need for compensating a landowner and the circuit court proceeding that could result in that remedy. Hence, the state concludes that the circuit courts do

not obtain jurisdiction before the agency has decided initially whether a regulatory taking has resulted from its regulatory action.

In *Springer v. City of Bend*, 111 Or.App. 136, 826 P.2d 1, *rev. den.* 313 Or. 354, 833 P.2d 1283 (1992), and *Nelson v. City of Lake Oswego*, 126 Or.App. 416, 869 P.2d 350 (1994), we addressed the effect of *Dunn* on circuit court jurisdiction and authority over inverse condemnation claims. We said in *Springer* that the Supreme Court had concluded in *Dunn*:

> "[A]lthough damages for inverse condemnation could only be recovered in a judicial action, 'regulatory takings' issues could arise as constitutional questions and be relevant in LUBA's disposition of appeals from local land use decisions. The court concluded that inverse condemnation issues could be asserted in both forums.
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> "Circuit courts have always had jurisdiction-- exclusive *or* concurrent--to try inverse condemnation claims; neither [the Supreme Court's nor this court's] opinion in *Dunn* did anything to change that, and both in fact reiterated it." 111 Or.App. at 138-39, 826 P.2d 1. (Emphasis in original; footnote omitted.)

However, we also noted in *Springer*:

> "The Supreme Court suggested that there might be circumstances in which a circuit court must delay a decision on an inverse condemnation claim until LUBA has decided a corresponding issue that is pending before it." 111 Or.App. at 139 n. 1, 826 P.2d 1.

If the question here was whether LUBA or the circuit court had initial *authority* to decide the question, we might agree with the distinction that the state draws as it applies to that

agency's initial authority and the circuit court's.[4] For a number of reasons, however, we cannot agree with the state's argument that, under *Dunn* or our cases, the circuit court lacked *jurisdiction* over this action. First, both *Dunn* and *Springer* make clear that the circuit courts *retain* their historical jurisdiction over inverse condemnation claims. *Dunn* does not purport to change that but, rather, holds that the statutes governing LUBA review *add* a form of concurrent LUBA jurisdiction; *Dunn* also holds that issues relating to the sequence of LUBA's and the courts' authority to act will arise in some contexts. However, neither of those holdings divests the circuit court of subject matter jurisdiction over inverse condemnation actions. They simply address the allocation or timing of authority between bodies that share jurisdiction.

The other reasons for our conclusion stem from the fact that the issue in this case does not involve LUBA's authority to decide takings questions; instead, the state asserts that agencies other than LUBA, whose regulations purportedly give rise to

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[4] The court in *Dunn* summarized its holding:

> "In sum, if an owner seeks to have a land use decision set aside on constitutional grounds, the owner must take that appeal to LUBA. An owner who maintains that the government's acts entitle him to compensation may seek compensation in [the] circuit court. If the owner seeks invalidation of the land use decision or compensation in the alternative, or both, and the government defends the validity of its regulatory decision and denies that compensation is due, the court may have to withhold judgment until the legality of the land use decision is placed before and decided by LUBA and the government has had an opportunity to reconsider and modify its decision. The special provision for taking evidence beyond the record made before the local government, ORS 197.830(1), as was done here, shows that a full LUBA review of whatever may bear on the constitutionality of a land use decision was not beyond legislative contemplation." 303 Or. at 209, 735 P.2d 609.

takings, have initial jurisdiction of the kind defined in *Dunn* to decide whether their own actions have occasioned takings. However, the court in *Dunn* did not purport to make a general or abstract allocation of jurisdiction or authority between the circuit courts and all agencies; rather, the *Dunn* decision was based very specifically on the statutes that confer jurisdiction on LUBA to review land use decisions and constitutional questions that arise in connection with them. *See* ORS 197.835(7)(a)(E). On the basis of that statutory analysis, the court concluded that the legislature has conferred jurisdiction on LUBA to share part of the circuit courts' historical decisional authority over takings questions.

The state attempts by analogy to equate LUBA's role and the board's under the *Dunn* rationale. The analogy does not succeed because, *inter alia*, LUBA is an adjudicative agency, while the board is the regulatory agency whose action is subject to adjudication to determine if it has resulted in a taking. The proper analogy is not between the board and LUBA, but between the board and a governmental body, as described in *Dunn*, that chooses to "[defend] the validity of its regulatory decision" before LUBA or the courts. 303 Or. at 209, 735 P.2d 609.

Whether it is performed by LUBA or the courts, the determination of whether a regulatory action results in a taking of private property is an adjudicative act. Leaving aside the fox in the henhouse problem with the state's contention that a regulatory agency should have sole original jurisdiction to decide in the same order that imposes a regulation whether the regulation results in a taking, the state's argument is mechanically flawed: The adjudication of whether there has been a regulatory taking will generally be dependent on a showing of facts that cannot even be known at the time that the regulatory decision is made, *e.g.*, the scope of the regulation's impact on a particular landowner's ability to make viable economic use of particular land. Although regulatory agencies obviously may consider

whether their prospective actions might result in takings, nothing in *Dunn* or in logic supports the view that they have jurisdiction, to the exclusion of the circuit courts, to decide whether their own consummated regulatory actions have resulted in takings.[5]

We reject the state's jurisdictional argument, and we conclude that the trial court erred by ruling that it lacked jurisdiction. We turn to the ripeness issue. It is unclear whether the state's contention that the APA provides plaintiff's exclusive remedy is meant to relate solely to jurisdiction, or is also meant to suggest that the action is not ripe, because plaintiff did not exhaust available appeals from the board's orders to reviewing bodies before bringing this action. If the latter point is intended, we rejected a materially similar contention in *Nelson v. City of Lake Oswego, supra*, and we reject the present variation of it as well. The state's other ripeness arguments depend on facts that cannot be determined from the complaint or the record before us. *See* n. 2, *supra*. We hold that it was error to dismiss the action on ripeness grounds.

The remaining question is whether the trial court was correct in ruling that plaintiff's complaint fails to state a claim. The state makes a number of arguments that are directed against specific allegations and theories that plaintiff pleads. However, the state also makes one argument attacking the sufficiency of plaintiff's complaint as a whole. It contends that plaintiff did not

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[5] We need not decide here whether the board has *any decisional* authority over such questions. The issue is whether the circuit court has jurisdiction. *See also Boise Cascade Corp. v. Board of Forestry, supra*, 131 Or.App. at 555 n. 1, 886 P.2d at 1043 n. 1.

> We note that there was no "land use decision" or other event here that could have been appealed to LUBA. The board is the only agency that was or could have been involved in the relevant final decisions.

and cannot plead that the alleged taking was an act by "a state agency authorized to exercise the power of eminent domain." According to the state, the board has no authority to condemn property. The state argues that that is an essential element of an inverse condemnation claim under *Tomasek v. State*, 196 Or. 120, 147, 248 P.2d 703 (1952), and later cases that follow it. However, the state reads *Tomasek* too literally; on the page of its opinion following the language on which the state relies, the court rejected as an "erroneous premise" the defendant's contention "that a distinction is to be drawn between the state itself and its agencies." 196 Or at 148, 248 P.2d 703.

More fundamentally, unlike the present case, *Tomasek* did not involve an alleged *regulatory* taking. Assuming that the state correctly reads *Tomasek* in its own context, the principle the state derives from it has no logical application in the regulatory takings context. It would be nonsensical to hold that there can be no regulatory taking claim if the regulatory agency whose action allegedly causes the taking happens not to have the power to condemn as well as the power to regulate. Even assuming that the Fifth Amendment would permit the state to make inverse condemnation proceedings unavailable for regulatory taking claims that are unrelated to the potential exercise of the eminent domain power, *Dunn v. City of Redmond, supra*, and *Springer v. City of Bend, supra*, make it clear that such proceedings are available for that purpose in this state.

Although plaintiff pleads a variety of *theories*, it has attempted to state only two *claims*: that there has been a taking of the "core" area of its property and that there has been a temporary taking of the four-acre tract that was subject to the board's "temporal" restriction on logging. In both contexts, plaintiff alleges, in essence, that the government has regulated its property in such a way that productive uses are unavailable and all viable economic and beneficial use has been eliminated. Those allegations suffice to state regulatory taking claims under

both constitutions as to the principal part of the property, *see Lucas v. South Carolina Coastal Council, supra*; *Fifth Avenue Corp. v. Washington Co., supra*, and a temporary taking of the four-acre part. *See First Lutheran Church v. Los Angeles County*, 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987).

Because the motion to dismiss was directed against and allowed as to the entire complaint, it is unnecessary for us to decide whether any or all of plaintiff's alternative taking theories may prove to be factually or legally tenable. We nevertheless note that, even assuming the correctness of plaintiff's legal premises, the presence or absence of the requisite facts to support plaintiff's permanent physical occupation and its reasonable investment-backed expectations theories cannot be determined without further evidentiary development.

The parties' remaining arguments either require no further separate discussion or relate to matters that are beyond the reviewable record.

Reversed and remanded.

325 Or. 185, 935 P.2d 411

BOISE CASCADE CORPORATION, a Delaware corporation, Respondent on Review,

v.

BOARD OF FORESTRY, Petitioner on Review.

CC 93-2018; CA A79626; SC S42159.

Supreme Court of Oregon

Argued and Submitted Jan. 10, 1996.
Decided April 10, 1997.

Virginia L. Linder, Solicitor General, Salem, argued the cause for petitioner on review. With her on the brief were Theodore R. Kulongoski, Attorney General, and John T. Bagg, Assistant Attorney General.

Philip D. Chadsey, of Stoel Rives Boley Jones & Grey, Portland, argued the cause for respondent on review. With him on the briefs was Charles F. Adams.

Before CARSON, C.J., and GILLETTE, VAN HOOMISSEN, FADELEY and DURHAM, JJ.*

On review from the Oregon Court of Appeals.

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* Unis, J., retired June 30, 1996, and did not participate in this decision; Graber, J., did not participate in the consideration or decision of this case.

GILLETTE, Justice.

This is an inverse condemnation case in which plaintiff Boise Cascade asserts that the defendant State of Oregon, acting through its Board of Forestry, has "taken" certain property of Boise Cascade by promulgating a rule that, Boise Cascade alleges, denies Boise Cascade all beneficial use of the property.[1] The state seeks review of a decision of the Court of Appeals, which reversed a circuit court order that dismissed plaintiff's inverse condemnation action under ORCP 21[2] on several grounds. *Boise Cascade Corp. v. Board of Forestry*, 131 Or.App. 538, 886 P.2d 1033 (1994) ("*Boise I*").[3] There are two

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[1] "Inverse condemnation" refers to a claim "against a governmental agency to recover the value of property taken by the agency although no formal exercise of the power of eminent domain has been completed by the taking agency." *Lincoln Loan v. State Hwy. Comm.*, 274 Or. 49, 51 n. 1, 545 P.2d 105 (1976) (citing *Thornburg v. Port of Portland*, 233 Or. 178, 180, 376 P.2d 100 (1963)).

"'Eminent domain' is the power inherent in a sovereign state of taking or of authorizing the taking of any property within its jurisdiction for a public use or benefit." *GTE Northwest, Inc. v. Public Utility Commission*, 321 Or. 458, 466, 900 P.2d 495 (1995) (citing *Dept. of Trans. v. Lundberg*, 312 Or. 568, 571 n. 1, 825 P.2d 641 (1992)).

[2] ORCP 21 A(8) provides:

> "Every defense, in law or fact, to a claim for relief in any pleading, whether a complaint, counterclaim, cross-claim or third party claim, shall be asserted in the responsive pleading thereto, except that the following defenses may at the option of the pleader be made by motion to dismiss: * * * (8) failure to state ultimate facts sufficient to constitute a claim[.]"

[3] *Boise I* was consolidated for purposes of oral argument in this court with our review of *Boise Cascade Corp. v. Board of Forestry*, 131 Or.App.

issues before us: (1) whether, in an inverse condemnation proceeding of this kind, a court should (or must) stay its own proceeding until the agency first has an opportunity to determine whether the application of its rule effected a "taking" and, if not, (2) whether plaintiff has stated a claim in this case. We conclude that plaintiff's complaint properly was before the circuit court, because the circuit court and the Board share concurrent jurisdiction in this case. We also conclude that certain of the allegations in plaintiff's complaint are sufficient to survive a motion to dismiss.

FACTS

In February 1992, plaintiff filed a proposal with the Oregon Department of Forestry ("the Department") to log a 64-acre parcel of plaintiff's land (the "Walker Creek Unit").[4]

552, 886 P.2d 1041 (1994) ("*Boise II*"). *Boise II* involves two petitions for judicial review of two final orders of the Board of Forestry. The first final order, dated January 15, 1993, denied plaintiff's plan to log the same 64-acre property owned by plaintiff that is the subject of the present case. The second final order, dated April 19, 1993, approved plaintiff's plan to log four acres within the larger parcel, subject to a temporal restriction that no logging occur during spotted owl nesting season. Plaintiff sought judicial review of both final orders in the Court of Appeals. The Court of Appeals consolidated the two administrative petitions (*Boise II*), but did not consolidate the circuit court appeal (*Boise I*) with *Boise II*.

[4] The Oregon Blue Book adequately describes the relationship between the Board of Forestry, State Department of Forestry, and the State Forester as follows:

> "The seven-member board [of forestry], appointed by the governor, makes policy and provides vision to the overall management and protection of the state's 11 million acres of state-owned and private forest land. It operates under ORS chapter 526 in setting forest policy for the state. The board authorizes a forestry program

The land contains northern spotted owl nests and is subject to the northern spotted owl protection provisions of OAR 629-24-809, which the Board of Forestry ("the Board") adopted in 1990.[5] The Department denied the proposal on the ground that the logging plan did not provide sufficient protection for spotted owl habitat, as required by OAR 629-24-809.

In May 1992, plaintiff submitted an amended logging plan. The Department again denied the proposal, pursuant to OAR 629-24-809, but advised plaintiff that eight specified acres of the Walker Creek Unit could be logged, if the logging did not take place either between March 1 and September 30, 1992

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for Oregon designed to assure an adequate future wood supply to benefit society, the economy and the environment.

"The Department of Forestry, authorized by ORS 526.008 and established in 1911, is under the direction of the state forester, who is appointed by the Board of Forestry. The statutes direct the state forester to act on all matters pertaining to forestry, the protection of forest lands and the conservation of forest resources."

Claire Levine, ed., *1995-96 Oregon Blue Book*, 67 (1995).

[5] OAR 629-24-809 provides, in part:

"(1) Whenever the State Forester determines that an operation will conflict with protection of a nesting site of the northern spotted owl * * *, the operator must obtain the State Forester's approval of a written plan before commencing the operation. The written plan, at a minimum, must address how the operation will be conducted to provide for the following:

"(a) A 70 acre area of suitable spotted owl habitat encompassing the nest site, to be maintained as suitable spotted owl habitat;

"(b) Prevention of disturbances resulting from operation activities which cause owls to flush from the nesting site. Such

(which was the critical period of use), or until young spotted owls fledged. Plaintiff appealed that decision to the Board arguing, inter alia, that such an application of OAR 629-24-809 to its Walker Creek Unit property effected a "taking" of that property under the state and federal constitutions.

On January 15, 1993, the Board rejected plaintiff's challenge and entered a final order denying plaintiff's logging plan for the 64 acres. With respect to plaintiff's "takings" argument, the Board stated:

> "Boise Cascade appears to have been undecided as to the appropriate time to advance this argument. Although it asserts * * * that such an argument is not premature, it did not at hearing attempt to present evidence that any 'taking' had in fact occurred. * * * Certainly[,] there is an inadequate factual basis upon which to advance any claim of a constitutional taking."

On February 1, 1993, plaintiff filed this inverse condemnation action in Clatsop County Circuit Court, alleging that the Board's application of its administrative rule constituted a "taking" under Article I, section 18, of the Oregon Constitution, and under the Fifth Amendment to the United States Constitution.[6] (*Boise I*).

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disturbances must be prevented during the critical period of use for nesting. The critical period of use is the time period between March 1 and September 30, each year."

[6] Article I, section 18, of the Oregon Constitution, provides:

> "Private property shall not be taken for public use, nor the particular services of any man be demanded, without just compensation; nor except in the case of the state, without such compensation first assessed and tendered[.]"

On February 22, 1993, after it had filed the present action, plaintiff submitted a plan to log four of the eight acres that the Department previously had agreed could be harvested. On March 8, 1993, the Department approved plaintiff's plan, subject to a condition that the logging not begin until October 1, 1993, and end by March 1, 1994, when no nesting would take place. Plaintiff appealed that temporal restriction to the Board and argued, *inter alia*, that the temporal restriction also constituted a temporary "taking" under the state and federal constitutions.

On March 17, 1993, while its second "takings" claim concerning the four-acre parcel still was pending before the Board, plaintiff petitioned the Court of Appeals for judicial review of the Board's January 15, 1993, order. (*Boise II*).

On April 19, 1993, the Board rejected plaintiff's challenge to the temporal restriction concerning the four acres and entered a second final order. In that order, the Board *did not address* the "takings" issue. Rather, the Board stated that "[t]he issue of whether there is a taking would more properly be [addressed] in a court of competent jurisdiction, once administrative remedies are exhausted."

On April 22, 1993, plaintiff filed a supplemental complaint in the present circuit court action, alleging that the

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The Fifth Amendment to the United States Constitution, provides:

> "No person shall * * * be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Takings Clause of the Fifth Amendment is made applicable to the states through the Due Process Clause of the Fourteenth Amendment. *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 827, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987).

separate temporal restriction on logging the four acres constituted a separate "taking." (*Boise I*).

On April 26, 1993, plaintiff filed a second petition for judicial review, seeking review of the Board's April 19, 1993, order that refused to remove the temporal condition on logging of the four acres. As noted, the Court of Appeals consolidated that proceeding with the earlier administrative review proceeding. (*Boise II*).

In May 1993, the circuit court granted the state's motion to dismiss the entire inverse condemnation claim on the grounds that the court lacked subject matter jurisdiction over the dispute, that the action was not ripe, and that the complaint failed to state a claim. (*Boise I*). Plaintiff appealed the circuit court's ruling to the Court of Appeals, which reversed the dismissal of plaintiff's inverse condemnation claim on all three grounds. The state petitioned for review.[7]

DISCUSSION

I. *Jurisdiction*

The first issue presented is whether, as the state argues, in a regulatory "takings" claim, the agency that promulgated the rule that is alleged to effect a "taking" has primary jurisdiction to determine whether the application of that rule does, in fact, constitute a "taking."[8] The Court of Appeals held that the Board and the circuit court have *concurrent* jurisdiction over plaintiff's

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[7] We reject the state's ripeness arguments for the reasons stated in the Court of Appeals' opinion. *Boise I*, 131 Or.App. at 540 n. 2, 886 P.2d 1033.

[8] The doctrine of "primary" jurisdiction is defined as a doctrine under which, "where the law vests in an administrative agency the power to decide a controversy or treat an issue, the courts will refrain from entertaining the case

"takings" claims, but declined to decide whether the Board has any "decisional authority" initially to decide the "takings" issue. *Boise I*, 131 Or.App. at 546-49, 886 P.2d 1033. The state advances two arguments on review: (1) The Board has "exclusive" jurisdiction, to the exclusion of the circuit court, to decide the "takings" issue; or, (2) alternatively, a regulatory "takings" claim must be resolved, in the first instance, by the agency whose rule is alleged to have effected a "taking," because the agency has "primary jurisdiction" over such claims.

There are two types of "primary" jurisdiction. First, *statutory* primary jurisdiction exists when a statute "specifically requires courts to apply the primary jurisdiction doctrine to a class of disputes." Kenneth Culp Davis and Richard J. Pierce, Jr., II, *Administrative Law Treatise* § 14.1, 276 (3d ed. 1994) (hereafter "Davis and Pierce").[9] Second, by contrast, "[i]n the bulk of cases * * *, primary jurisdiction is a judge-made doctrine. Its scope and effect are determined by judicial reasoning." *Ibid.* There is no statute that addresses the issue before us; the state in this case is asserting the latter type of primary jurisdiction.

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until the agency has fulfilled its statutory obligation." *Black's Law Dictionary* 1190-91 (6th ed. 1990). An even clearer and more comprehensive definition appears in a standard layman's dictionary: "[T]he right or responsibility of an administrative or regulatory agency to pass initially on controversies involving matters of fact or discretion within its sphere before relief is sought in the courts[.]" *Webster's Third New Int'l Dictionary* 1800 (unabridged ed. 1993). "Exclusive" jurisdiction is defined as jurisdiction "to the exclusion of all other [tribunals]." *Black's*, at 564. "Concurrent" jurisdiction means, in this case, that a court and administrative agency share "[a]uthority * * * to deal with the same subject matter." *Id.* at 291.

[9] For example, Professor Davis notes that "Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq., provid[es] for nonjudicial and nonadversary resolution of claims and provid[es] that a complainant in a state or locality with a fair employment commission must first go to that commission with his claim." Davis and Pierce, § 14.1 at 276.

Judicial invocation of the doctrine of primary jurisdiction generally is appropriate when a court decides that an administrative agency, rather than a court of law, initially should determine the outcome of a dispute or one or more issues within that dispute that fall within that agency's statutory authority. The purpose behind the doctrine is the "recognition of the need for orderly and sensible coordination of the work of agencies and of courts." Kenneth Culp Davis, *Administrative Law Text* § 19.01, 374 (3d ed.1972). The reason for the doctrine is "not a belief that an agency's expertise makes it superior to a court; [but] that a court confronted with problems within an agency's areas of specialization should have the advantage of whatever contributions the agency can make to the solutions." *Id.*, § 19.06 at 381. That is, the doctrine is one ordinarily invoked by a court in the traditional judicial system with the belief that a previous agency disposition of one or more issues before the court will assist the court in resolving the case before it.

Courts vary in their approaches to invoking the doctrine of primary jurisdiction. According to one treatise on administrative law, with which we agree:

> "There is no fixed formula for determining whether an agency has primary jurisdiction over a dispute or an issue raised in a dispute. In making such determinations, courts consider several factors, including (1) the extent to which the agency's specialized expertise makes it a preferable forum for resolving the issue, (2) the need for uniform resolution of the issue, and (3) the potential that judicial resolution of the issue will have an adverse impact on the agency's performance of its regulatory responsibilities."

Davis and Pierce, § 14.1 at 272. The authors also observe, however, that, "[i]ncreasingly, * * * courts balance the considerations that favor allocation of initial decisionmaking

responsibility to an agency against the likelihood that application of primary jurisdiction will unduly delay resolution of the dispute before the court." *Ibid.*

Upon invoking the doctrine of primary jurisdiction, the disposition of the case depends on the nature of the parties' dispute and the scope of the agency's authority. If an agency has primary jurisdiction over the entire dispute, the court action is dismissed. However, if an agency has primary jurisdiction over an issue in dispute,

> "the court will defer any decision in the action before it until the agency has addressed the issue that is within its primary jurisdiction. The court retains jurisdiction over the dispute itself and all other issues raised by the dispute, but it cannot resolve that dispute until the agency has resolved the issue that is in its primary jurisdiction."

Davis and Pierce, § 14.1 at 271.

We now turn to the present case. The state argued in the Court of Appeals that the Board has primary jurisdiction over the "takings" claim under *Dunn v. City of Redmond*, 303 Or. 201, 735 P.2d 609 (1987).[10] The Court of Appeals rejected that argument for two reasons. First, the court concluded that Dunn did not hold that circuit courts lack jurisdiction over inverse condemnation claims. Rather, that case concerned the sequence of the Land Use Board of Appeals ("LUBA") and the circuit court's authority to act in some contexts, where both land use and "takings" issues were asserted and intertwined. *Boise I*, 131 Or.App. at 548, 886 P.2d 1033. Second, the Court of Appeals

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[10] The facts and procedural history of *Dunn* are discussed below, 325 Or. at 195, 935 P.2d at 418.

observed that Dunn dealt with LUBA's authority to decide "takings" questions and "did not purport to make a general or abstract allocation of jurisdiction or authority between the circuit courts and all agencies." *Ibid.*

The Court of Appeals also observed that LUBA is an adjudicative agency, while the Board is a regulatory agency, and that "the determination of whether a regulatory action results in a taking of private property is an adjudicative act." *Id.* at 549, 886 P.2d 1033. The court stated:

> "Leaving aside the fox in the henhouse problem with the state's contention that a regulatory agency should have sole original jurisdiction to decide in the same order that imposes a regulation whether the regulation results in a taking, the state's argument is mechanically flawed: The adjudication of whether there has been a regulatory taking will generally be dependent on a showing of facts that cannot even be known at the time that the regulatory decision is made, *e.g.*, the scope of the regulation's impact on a particular landowner's ability to make viable economic use of particular land. Although regulatory agencies obviously may consider whether their prospective actions might result in takings, nothing in *Dunn* or in logic supports the view that they have jurisdiction, to the exclusion of the circuit courts, to decide whether their own consummated regulatory actions have resulted in takings."

Ibid. (footnote omitted).

On review, the state challenges what it describes as the Court of Appeals' "overly narrow" application of *Dunn*. The state concedes that *Dunn* arose in a different context from this case, but argues that the rationale underlying *Dunn* supports the conclusion that the agency has *primary jurisdiction* to resolve a

regulatory "takings" claim in this case.[11] In the state's view, *Dunn* "stands for the proposition that the forum jurisdiction issue requires an examination, first and foremost, of the statutory scheme that the legislature has put into place" and for the proposition that "the legislature may place jurisdiction over takings claims in an administrative venue, and that legislative choice will be respected by the courts."

The state observes that the Board, like other administrative agencies, has authority to consider a complaint that includes constitutional claims. From that fact, the state reasons that the Board has authority to resolve a "takings" claim. According to the state, "[t]he fact that the board has the authority to adjudicate constitutional challenges to its own rule, and that under the APA [Oregon Administrative Procedures Act (ORS chapter 183)] its decisions are subject to full judicial review, should have led the Court of Appeals to conclude that the board has primary, if not exclusive, jurisdiction over the takings challenge." The state also argues, *inter alia*, that an inverse condemnation action in circuit court is duplicative and unnecessary, because administrative proceedings and judicial review of those proceedings adequately protect the constitutional interests at stake.

At the outset, we note that the state's reliance on *Dunn* is misplaced. In *Dunn*, a petitioner sought judicial review of LUBA's determination that two city ordinances did not constitute a "taking" of petitioner's land. The landowner argued that the ordinances allowed the city to "take" property, in violation of the state and federal constitutions. The Court of Appeals did not reach the merits of that claim, because it decided *sua sponte* that

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[11] In the alternative, the state argues that the Court of Appeals should have concluded "that the board has primary, *if not exclusive*, jurisdiction over the takings challenge." (Emphasis added.)

the challenged actions were beyond LUBA's jurisdiction and ordered LUBA to dismiss the proceeding. *Dunn v. City of Redmond*, 82 Or.App. 36, 727 P.2d 145 (1986).

On review, this court noted that "Oregon land use law assigns * * * LUBA 'exclusive jurisdiction' to review a 'land use decision,' including review of its constitutionality. ORS 197.825, 197.835(8)(a)(E)." *Dunn*, 303 Or. at 203, 735 P.2d 609. The court also noted that, under the applicable statutes, LUBA could "reverse or remand" an unconstitutional land use decision. On the other hand, LUBA could not "award compensation when the constitutional claim is that the challenged decision takes private property for public use without just compensation." *Id.* at 204, 735 P.2d 609. The court stated:

> "In sum, if an owner seeks to have a land use decision set aside on constitutional grounds, the owner must take that appeal to LUBA. An owner who maintains that the government's acts entitle him to compensation may seek compensation in circuit court. If the owner seeks invalidation of the land use decision or compensation in the alternative, or both, and the government defends the validity of its regulatory decision and denies that compensation is due, the [circuit] court may have to withhold judgment until the legality of the land use decision is placed before and decided by LUBA and the government has had an opportunity to reconsider and modify its decision."

Id. at 209, 735 P.2d 609. *Dunn* rejected the Court of Appeals' conclusion that "LUBA loses jurisdiction whenever 'a taking claim is asserted,' even if the petition asserts that claim in an effort to invalidate a land use decision rather than to obtain compensation." *Id.* at 208, 735 P.2d 609.

In contrast to *Dunn*, this case does not involve a legislative grant of "exclusive jurisdiction" to an agency such as LUBA to consider plaintiff's claim. Rather, this case involves a circuit court challenge to final orders that the Board had the authority to enter. The alleged *effect* of the final orders was to preclude plaintiff from using its land. In our view, *Dunn* makes it clear that the fact that plaintiff's inverse condemnation claim *stems from* an agency order does not preclude the circuit court from exercising jurisdiction. The issue presented--whether a "taking" occurred--is a constitutional question, and the context within which it is raised, an inverse condemnation action, traditionally falls within an area adjudicated by courts. Therefore, the traditional rationales for primary jurisdiction, such as agency expertise, collateral estoppel, and efficiency either are not applicable or are present only to a diminished degree.

Moreover, in this case, "the special competence of an administrative body" is not required to determine whether the application of OAR 629-24-809 effected a "taking" of plaintiff's land. *Cf.* Kenneth Culp Davis, *Administrative Law* 121 (6th ed. 1977) ("a court should not act upon subject matter that is peculiarly within the agency's specialized field without taking into account what the agency has to offer"). Likewise, other justifications for invoking the doctrine of primary jurisdiction, such as a need for uniform resolution of the legal issue involved or a consideration whether judicial resolution of the issue may adversely impact the agency's performance of its regulatory responsibilities, are not present in this context. Accordingly, it is not appropriate in this case to prevent the circuit court from exercising its jurisdiction over plaintiff's "takings" claim by invoking the doctrine of primary jurisdiction. That being so, we hold that plaintiff's complaint properly was before the circuit court, because the circuit court and the Board share concurrent jurisdiction in this case. It follows that the trial court erred in dismissing the action for lack of subject matter jurisdiction.

II. *"Takings" by inverse condemnation under the Oregon Constitution*

Because this case comes to us on appeal of a judgment of dismissal, we next must determine whether plaintiff's complaint states a claim for relief.[12] For purposes of reviewing a motion to dismiss, we assume the truth of all well-pleaded facts alleged in the complaint and give plaintiff the benefit of all favorable inferences that may be drawn from those facts. *Stringer v. Car Data Systems, Inc.*, 314 Or. 576, 584, 841 P.2d 1183 (1992); *Oksenholt v. Lederle Laboratories*, 294 Or. 213, 215, 656 P.2d 293 (1982). In order to determine whether the complaint states a claim for relief, we first must discern what is required to establish a "takings" claim under Oregon law.[13]

Our decisional law demonstrates that there are at least two different ways in which governmental action may result in a "taking" by inverse condemnation under Article I, section 18, of the Oregon Constitution. The first arises when a present governmental action creates an expectation that the private land in question eventually will be taken for a public use. *See Fifth Avenue Corp. v. Washington Co.*, 282 Or. 591, 613, 581 P.2d 50 (1978) (illustrating concept). In such circumstances, a property owner must prove that the owner is precluded from "all economically feasible private uses [of the property] pending eventual taking for public use" or that "the designation [of the property for eventual public use] results in such governmental intrusion as to inflict virtually irreversible damage." *Id.* at 613-14, 581 P.2d 50.

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[12] We use the term "complaint" to refer to the supplemental complaint on which the parties ultimately proceeded.

[13] This court considers state constitutional claims before considering federal constitutional claims. *State v. Kennedy*, 295 Or. 260, 262, 666 P.2d 1316 (1983); *Sterling v. Cupp*, 290 Or. 611, 614, 625 P.2d 123 (1981).

The second category of "takings" by inverse condemnation occurs when the government acts to "intervene[ ] to straighten out situations in which the citizenry is in conflict over land use or where one person's use of his land is injurious to others." *Fifth Avenue Corp.*, 282 Or. at 613, 581 P.2d 50 (quoting *Fred F. French Inv. Co., Inc. v. City of New York*, 39 N.Y.2d 587, 385 N.Y.S.2d 5, 350 N.E.2d 381, 384-86 (citing Joseph L. Sax, *Takings and the Police Power*, 74 Yale L.J. 36, 62-63 (1964)), *cert. den.* 429 U.S. 990, 97 S.Ct. 515, 50 L.Ed.2d 602 (1976)). To establish a "taking" in the latter context, the test is essentially the same as under the former: The property owner must show that the application of the government's particular choice deprives the owner of *all economically viable use of the property*. *Fifth Avenue Corp.*, 282 Or. at 609, 613, 581 P.2d 50. If the owner has "some substantial beneficial use" of the property remaining, then the owner fails to meet the test. *Dodd v. Hood River County*, 317 Or. 172, 184-86, 855 P.2d 608 (1993).

In this case, plaintiff has alleged in both its claims for relief that the Board's application of OAR 629-24-809 to its proposed logging plans denied plaintiff all economic use of its land.[14] With respect to the first claim for relief, the plaintiff has alleged "depriv[ation] * * * of the only economically viable use of approximately 56 acres of merchantable timber." Assuming

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[14] Plaintiff's complaint outlines the lengthy procedural facts set forth above, which we will not repeat. The complaint also alleges, in part:

> "Plaintiff asserts two claims for inverse condemnation based on the Oregon and U.S. Constitutions. The first claim seeks just compensation for this regulatory taking, *which deprives plaintiff of the only economically viable use of approximately 56 acres of the merchantable timber*. The second claim involves a *temporal restriction prohibiting plaintiff from logging four acres of the unit until after October 1, 1993, which constitutes a temporary taking of plaintiff's timber for a public use*."

the truth of all well-pleaded facts alleged in the complaint and giving plaintiff the benefit of all favorable inferences that may be drawn from those facts, that allegation is sufficient to meet the "deprivation of all economically viable use of the property" standard. The Court of Appeals was correct in so holding.

With respect to the second claim for relief, plaintiff has alleged two things: (1) The "*temporal* restriction prohibiting plaintiff from logging four acres of the unit until after October 1, 1993, * * * constitutes a *temporary* taking of plaintiff's timber for a public use," and (2) "[p]laintiff is *presently* deprived of all economic use of its merchantable timber on the subject four acres." (Emphasis added.) In other words, plaintiff alleges a *temporary* deprivation of all economically viable use of the four acres *during the six-month period* when the temporal restriction was in effect.

Both this court and the United States Supreme Court have recognized that, under certain circumstances, a "temporary" taking of all economic use of a piece of property may constitute a "taking" under the pertinent provisions of the state and federal constitutions. *See Suess Builders v. City of Beaverton*, 294 Or.

"FIRST CLAIM FOR RELIEF

"*The timber, including the two nest trees, on the Walker Creek Unit which plaintiff desires to log has no economic value unless harvested. The Board's action in denying plaintiff the right to log the Walker Creek Unit has denied it of all economic use of that timber. Apart from the subject merchantable timber, the underlying commercial forestland has no separate economic value until the timber has been logged.*"

"SECOND CLAIM FOR RELIEF

"*Plaintiff is presently deprived of all economic use of its merchantable timber on the subject four acres.*"
(Emphasis added.)

254, 263, 656 P.2d 306 (1982) (decided at least in part under Article I, section 18, of the Oregon Constitution; holding that complaint, liberally construed, could be deemed to allege that one or more local governments had "temporarily taken all economic use of the plaintiffs' property"); *First Lutheran Church v. Los Angeles County*, 482 U.S. 304, 318, 107 S.Ct. 2378, 2387, 96 L.Ed.2d 250 (1987) (holding to similar effect under Fifth and Fourteenth Amendments to the United States Constitution). But each of those cases was one in which a government regulation or ordinance that was on its face permanent in character allegedly prevented the owners from making *any* economic use of the property in question. By contrast, the allegations here affirmatively establish that, under the regulations, plaintiff *can* utilize the four acres in question for timber production during part of each calendar year. That is, the regulations appear to be permanent, but their interference with plaintiff's use of its property is not temporally comprehensive.

We think that, in order to distinguish between a "taking," on the one hand, and simple administrative inconvenience or delay, on the other, it is necessary to require that a complaining party allege some degree of permanence in its loss. We hold that, in order to assert a claim for a "temporary taking" under the Oregon Constitution, the complaining party must allege that it has been denied all economic use of its property under a law, ordinance, regulation, or other government action that either is permanent on its face or so long lived as to make any present economic plans for the property impractical. *See Suess Builders*, 294 Or. at 262-63, 656 P.2d 306 (to that effect). Under such a standard, plaintiff's complaint falls short. It alleges only that, during certain months of each year, it will not be permitted to harvest trees on the parcel. By necessary implication, there is nothing in the regulations that would prohibit harvesting during the balance of the year. To be a "taking," governmental action must be made of sterner stuff.

We understand the federal rule, under *First Lutheran*, to be to the same effect. 482 U.S. at 318, 107 S.Ct. at 2387. The Court of Appeals erred in holding that plaintiff had alleged a sufficient claim in its second claim for relief.

The state attempts to avoid the entire "takings" question by relying on *GTE Northwest, Inc. v. Public Utility Commission*, 321 Or. 458, 900 P.2d 495 (1995). The state argues that *GTE* stands for the proposition that express eminent domain authority is the predicate to a compensable "taking." In *GTE*, plaintiff GTE (a telephone local exchange carrier, "LEC") sought review of certain collocation rules adopted by the Public Utility Commission ("PUC").[15] Under the challenged rule, an LEC was required to allow an enhanced services provider ("ESP") to occupy a portion of the LEC's property, for the purpose of placing the ESP's equipment there.

GTE argued that the PUC lacked the statutory authority to promulgate the collocation rules, because the rules allegedly constituted a "taking," in violation of the state and federal constitutions. GTE further argued that, because the PUC lacked the *express* eminent domain authority that is required before an agency may effect a "taking," the collocation rules are beyond the PUC's statutory authority, no matter how much compensation might be paid for actions taken under them. In other words, GTE argued that the PUC lacked authority to engage in acts, including rulemaking, that effect a "taking," because the PUC lacked *express* eminent domain authority to take property for a public purpose.

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[15] "'Collocation' means a service, offered by a[n] LEC, which provides for placement and installation of a customer's equipment, software, and databases on LEC premises. Premises include central offices, remote network facilities, or any other similar location owned by the LEC. The equipment, software, and databases are owned by the customer." *GTE*, 321 Or. at 462, 900 P.2d 495.

This court in *GTE* outlined relevant decisional law and stated:

> "The cases cited above establish a bright-line rule: that an agency may not act in eminent domain without an express grant of power from the legislature. It is up to the legislature, not the PUC or any other administrative agency, to determine how those powers should be exercised. The legislature's reasons for granting or refusing to grant [to] an administrative agency the power to act in eminent domain may include a desire to refrain from depleting the public fisc. However, the legislature's decision may also be rooted in a number of other policy considerations.
>
> "* * * * *
>
> "In summary, the power of eminent domain may be exercised by an agency only if the agency has express statutory authority. The PUC does not have express statutory authority to promulgate rules that would effect a taking of an LEC's facilities."

321 Or. at 467-68, 900 P.2d 495. The *GTE* court then concluded that the collocation rules effected a "taking" under the federal constitution, and struck them down. *Id.* at 477, 900 P.2d 495.

The state relies on that portion of *GTE* that defines the "bright-line" rule concerning express eminent domain authority. That passage from *GTE* is significant, the state argues, because express eminent domain authority "is a key element of an inverse condemnation claim and of the right to seek compensation for a regulatory taking."

The state misreads *GTE*. *GTE* involved a straightforward *eminent domain* action in which the issue was whether the state could "take" certain property and, if so, what compensation was owed to the property owner. Unlike *GTE*, this case involves an *inverse condemnation* action in which plaintiff alleges that the state "took" plaintiff's property when it issued two orders that prevented plaintiff from logging on two separate occasions. The "bright-line" rule set forth in *GTE* applies in the eminent domain context. In contrast, in an inverse condemnation action wherein a plaintiff alleges that a "taking" *has occurred* and the plaintiff seeks damages, *GTE* does *not* require a landowner to prove that an agency has express eminent domain authority as an element to an inverse condemnation action. Rather, the issue in this case is whether the application of OAR 629-24-809 to plaintiff's timber harvest plans *resulted in* a "taking." Plaintiff has alleged that application of the rule in this case *did* result in a taking. *GTE* does not stand for any proposition that would defeat circuit court jurisdiction in such circumstances.

In summary, we conclude that the Board shares concurrent jurisdiction with the circuit court in this case. The Board does not have primary jurisdiction. Consequently, plaintiff's complaint was properly before the circuit court, assuming that it otherwise properly pleaded a claim for relief for inverse condemnation. We hold that it did adequately plead such a claim in its first claim for relief. It did not do so in its second claim for relief.

The decision of the Court of Appeals is affirmed in part and reversed in part. The judgment of the circuit court is affirmed in part and reversed in part, and the case is remanded to that court for proceedings consistent with this opinion.

FILED: November 10, 1999

IN THE COURT OF APPEALS
OF THE STATE OF OREGON

BOISE CASCADE CORPORATION,
a Delaware corporation,

Respondent,

v.

STATE OF OREGON, by and through
the Oregon State Board of Forestry,

Appellant.

(93-2018; CA A100855)

Appeal from Circuit Court, Clatsop County, Paula J. Brownhill, Judge.

John T. Bagg, Assistant Attorney General, attorney for appellant.

Phillip D. Chadsey attorney for respondent.

Daniel Kearns, Reeve Kearns PC, and John D. Echeverria filed a brief *amicus curiae* for Audubon Society of Portland.

Brent D. Boger, Robin L. Rivett, and Eric Grant filed a brief *amicus curiae* for Pacific Legal Foundation, Oregon Farm Bureau, and California Farm Bureau Federation.

Before De Muniz, Presiding Judge, Deits, Chief Judge, and Armstrong, Judge.

DE MUNIZ, P. J.

Reversed and remanded

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Appellant
[X] Costs allowed, payable by: Respondent

MONEY JUDGMENT

Judgment #1

Creditor:	STATE OF OREGON, by and through the Oregon State Board of Forestry
Debtor:	BOISE CASCADE CORPORATION, a Delaware corporation
Costs:	$3,088.99
Attorney fees:	-0-
TOTAL AMOUNT:	$3,088.99
Interest:	Simple, 9% per annum, from the date of this appellate judgment.

Appellate Judgment
Effective Date: December 15, 2000

COURT OF APPEALS
(seal)

OREGON ADMINISTRATIVE RULES COMPILATION
CHAPTER 629. DEPARTMENT OF FORESTRY
EMERGENCY FIRE COST COMMITTEE
DIVISION 665. SPECIFIED RESOURCE SITE PROTECTION RULES
Current through August 15, 2000

629-665-0210

Interim Requirements for Northern Spotted Owl Nesting Sites

(1) Whenever the State Forester determines that an operation will conflict with protection of a nesting site of the northern spotted owl (Strix occidentalis caurina), the operator must obtain the State Forester's approval of a written plan before commencing the operation. The written plan, at a minimum, must address how the operation will be conducted to provide for the following:

(a) A 70 acre area of suitable spotted owl habitat encompassing the nest site, to be maintained as suitable spotted owl habitat;

(b) Prevention of disturbances resulting from operation activities which caused owls to flush from the nesting site. Such disturbances must be prevented during the critical period of use for nesting. The critical period of use is the time period between March 1 and September 30, each year.

(2) For the purpose of this rule, nesting site means and includes the tree, when known, containing a spotted owl nest; or when not specifically known, includes an activity center of a pair of adult spotted owls. An activity center is a location determined by the State forester to have been reliably identified as being occupied by an adult pair of spotted owls, capable of breeding. Such determination must be supported by repeated observation of the owls in close proximity or observation of nesting behavior.

(3)(a) For the purposes of this rule, suitable spotted owl habitat means and includes:

(A) A stand of trees with moderate to high canopy closure (60 to 80%); a multi-layered, multi-species canopy dominated by large overstory trees (greater than 30 inches in diameter at breast height); a high incidence of large trees with various deformities (e.g., large cavities, broken tops, and other evidence of decadence); numerous large snags; large accumulations of fallen trees and other woody debris on the ground; and sufficient open space below the canopy for owls to fly; or

(B) In the absence of habitat which exhibits all the characteristics listed above, the available forested habitat which comes closest to approximating the listed conditions.

(b) Stands which do not exhibit at least two of the characteristics listed in paragraph (a)(A) of this section are not suitable habitat.

(4) (For information only) Federal law prohibits a person from taking northern spotted owls. Taking under the federal law may include significant alteration of owl habitat on any class of land ownership. Compliance with subsection(1) of this rule is not in lieu of compliance with any federal requirements related to the federal **Endangered Species Act**.

(5) Exceptions to the requirements for protecting northern spotted owl nesting sites may be approved by the State Forester if the operator has obtained an incidental take permit from federal authorities under the federal **Endangered Species Act**.

Stat. Auth.: ORS 527.710
Stats. Implemented: ORS 527.715
Hist.: FB 11-1990(Temp), f. 12-20-89, cert. ef. 12-21-90; FB 5-1991, f. & cert. ef. 6-6-91; FB 9-1996, f. 12-2-96, cert. ef. 1-1-97, Renumbered from 629-024-0809

DEPARTMENT OF FORESTRY

DIVISION 680
RESOURCE SITE INVENTORY AND PROTECTION PROCESS RULES

629-680-0000
Purpose

(1) OAR 629-680-0000 to 0430 shall be known as the Resource Site Inventory and Protection Process Rules.

(2) The purpose of the rules in OAR 629, Division 680 is to set criteria to inventory and protect special resources described in ORS 527.710 (3)(a) on forestlands regulated by the Forest Practices Act. Forests make a vital contribution to Oregon by providing jobs, products, tax base and other social and economic benefits, by helping to maintain forest tree species, soil, air and water resources and by providing a habitat for wildlife and aquatic life. Consistent with ORS 527.630, it is the policy of these rules to encourage economically efficient forest practices that assure the continuous growing and harvesting of forest tree species and the maintenance of forestland for such purposes as the leading use on privately owned land, consistent with sound management of soil, air, water and fish and wildlife resources that assures the continuous benefits of those resources for future generations of Oregonians.

Stat. Auth.: ORS 527.710
Stats. Implemented: ORS 527.715
Hist.: FB 4-1990, f. & cert. ef. 7-25-90; FB 3-1991, f. & cert. ef. 5-23-91; FB 9-1996, f. 12-2-96, cert. ef. 1-1-97, Renumbered from 629-056-0010

OREGON ADMINISTRATIVE RULES COMPILATION
CHAPTER 629. DEPARTMENT OF FORESTRY
EMERGENCY FIRE COST COMMITTEE
DIVISION 680. RESOURCE SITE INVENTORY AND PROTECTION PROCESS RULES
Current through August 15, 2000

629-680-0010
Definitions

In addition to the definitions listed in OAR 629-600-0100, as used in OAR Chapter 629, Division 680:

(1) "Critical period of use" means the time of year the State Forester determines a species is sensitive to disturbance at a resource site.

(2) "Disturbance" means actions which cause birds to flush from the resource site.

(3) "Endangered species" means any fish or wildlife species identified as "endangered" on lists that are adopted, by rule, by the Oregon Fish and Wildlife Commission or are federally listed as "endangered" under the **Endangered Species Act of 1973** as amended.

(4) "Listed species" means a species adopted by the Board under OAR 629-680-0200.

(5) "Site productivity" means the ability of a resource site to produce the benefits for which it is being protected. As an example, nesting site productivity is measured by the number of young birds successfully raised. For a roosting site, productivity is measured by the number of birds roosting over a given time. Watering site productivity is measured by the number of band-tailed pigeons that visit the resource site over a given time.

(6) "Threatened species" means any fish or wildlife species identified as "threatened" on lists that are adopted, by rule, by the Oregon Fish and Wildlife Commission or are federally listed as "threatened" under the **Endangered Species Act of 1973** as amended.

Stat. Auth.: ORS 527.710

Stats. Implemented: ORS 527.715
Hist.: FB 4-1990, f. & cert. ef. 7-25-90; FB 3-1991, f. & cert. ef. 5-23-91; FB 8-1991, f. & cert. ef. 10-30-91; FB 9-1996, f. 12-2-96, cert. ef. 1-1-97, Renumbered from 629-056-0020

OREGON ADMINISTRATIVE RULES COMPILATION
CHAPTER 629. DEPARTMENT OF FORESTRY
EMERGENCY FIRE COST COMMITTEE
DIVISION 680. RESOURCE SITE INVENTORY AND PROTECTION PROCESS RULES
Current through August 15, 2000

629-680-0100

Process for Board Evaluation of Threatened and Endangered Fish and Wildlife Species that use Resource Sites that are Sensitive to Forest Practices

(1) When a species is listed as threatened or endangered by state or federal authorities, the Board shall adopt rules to protect resource sites that are used by those species and that are sensitive to forest practices. The following process shall be used when the Board develops protection rules for these resource sites:

(a) The Board's evaluation shall be based on the best available information summarized in a technical review paper. The paper must be submitted by those proposing protection for resource sites used by a threatened or endangered species. The paper may be written by the State Forester, another agency, an organization or a person. The paper shall demonstrate how the resource sites are sensitive to forest practices. The paper may rely upon information used during the listing process and must:

(A) Identify the resource sites used by the species;

(B) Identify forest practices that conflict with the resource sites;

(C) Evaluate the biological consequences of the identified conflicts; and

(D) Propose protection requirements and exceptions for the resource sites.

(b) The State Forester shall review the technical paper submitted under subsection(1)(a) of this rule. The review shall include an evaluation of the literature used, consultation with technical experts and a technical review by experts chosen by the

State Forester. The State Forester shall submit a report of this review to the Board.

(c) The Board shall review and accept or reject the information presented in subsections(1)(a) and (b) of this rule;

(d) Using the technical review paper and the State Forester's report, plus other available information for the species, the Board shall:

(A) Identify the resource sites for the species;

(B) Identify forest practices that conflict with the resource sites and evaluate the consequences of those conflicts;

(C) Determine the protection requirements for the resource sites; and

(D) Determine any exceptions criteria.

(2) The Board shall adopt protection requirements and exception criteria for resource sites used by the threatened or endangered species.

(3) The State Forester shall maintain an inventory of protected resource sites that are used by threatened or endangered species.

(4) When a threatened or endangered species is de-listed by the Oregon Fish and Wildlife Commission or the U.S. Fish and Wildlife Service, the Board shall determine whether continued protection of resource sites is warranted:

(a) If the Board determines that continued protection rules are warranted, the rules shall be promulgated under the appropriate statutory authority;

(b) If the Board determines that continued protection rules are not warranted, existing rules shall be repealed.

Stat. Auth.: ORS 527.710

Stats. Implemented: ORS 527.715

Hist.: FB 4-1991, f. & cert. ef. 5-23-91; FB 9-1996, f. 12-2-96, cert. ef. 1-1-97, Renumbered from 629-056-0100

OREGON ADMINISTRATIVE RULES COMPILATION
CHAPTER 629. DEPARTMENT OF FORESTRY
EMERGENCY FIRE COST COMMITTEE
DIVISION 680. RESOURCE SITE INVENTORY AND PROTECTION PROCESS RULES
Current through August 15, 2000

629-680-0220
Process for Determining Forest Practices Conflicts and Consequences; Protection Requirements for the Resource Site

(1) The following process shall be used by the Board to evaluate forest practices conflicts and consequences and in setting appropriate protection for the resource site. Using the technical review paper developed in OAR 629-680-0200, plus other available information for each listed species, the Board shall:

(a) Identify the resource site for each listed species;

(b) Identify forest practices that conflict with the resource site and evaluate the consequences of those conflicts;

(c) Determine the protection requirements necessary to protect the resource site;

(d) Determine any exceptions criteria.

(2) The Board shall adopt protection requirements and exception criteria for each species listed in OAR 629-665-0100.

Stat. Auth.: ORS 527.710

Stats. Implemented: ORS 527.715

Hist.: FB 4-1990, f. & cert. ef. 7-25-90; FB 9-1996, f. 12-2-96, cert. ef. 1-1-97, Renumbered from 629-056-0220

Supreme Court, U.S.
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OFFICE OF THE CLERK

No. ____

In the Supreme Court of the United States

October Term, 2000

BOISE CASCADE CORPORATION, a Delaware corporation,

Petitioner,

v.

STATE OF OREGON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE OREGON COURT OF APPEALS

APPENDIX TO PETITION FOR WRIT OF CERTIORARI VOLUME II

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January 25, 2001

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TABLE OF APPENDICES

Appendix	Document
A	*Boise Cascade Corp. v. State ex rel. Oregon State Board of Forestry*, 991 P.2d 563 (Or. App. 1999).
B	Order of Oregon Court of Appeals dated March 15, 2000, in *Boise Cascade Corp. v. Board of Forestry* (CA A100855), denying reconsideration of its prior decision reported at 991 P.2d 563.
C	Order of the Oregon Supreme Court dated October 24, 2000, in *Boise Cascade Corp. v. Board of Forestry*, ___ P.2d ___ (SC S47459), denying petition for review.
D	Letter Opinion dated October 16, 1997, of the Clatsop County Circuit Court (No. 93-2018) denying Petitioner summary judgment on its possessory takings claim, and granting summary judgment on the issue of liability on Petitioner's regulatory takings claim.
E	Jury Verdict dated November 21, 1997, in *Boise Cascade Corp. v. Board of Forestry* (Clatsop County Circuit Court No. 93-2018), finding the State liable on Petitioner's *Loretto* claim and making findings on the compensation issues.
F	Judgment of the Clatsop County Circuit Court in *Boise Cascade Corp. v. Board of Forestry*, No. 93-2018, entered on April 30, 1993.
G	*Boise Cascade Corp. v. Board of Forestry*, 886 P.2d 1033 (Or. App. 1994).

H — *Boise Cascade Corp. v. Board of Forestry*, 935 P.2d 411 (Or. 1997).

I — Appellate Judgment in *Boise Cascade Corp. v. Board of Forestry*, (CA A78968, A79458, SC S47459), entered on December 15, 2000.

J — Oregon Administrative Rule 629-665-0210 (2000), formerly numbered 629-024-0809.

K — Oregon Administrative Rule 629-680-000 (2000), formerly numbered 629-056-0010.

L — Oregon Administrative Rule 629-680-0010(5) (2000), formerly numbered 629-056-0020(5).

M — Oregon Administrative Rule 629-680-0100(1) (2000), formerly numbered 629-056-0100(1).

N — Oregon Administrative Rule 629-680-0220 (2000), formerly numbered 629-056-0220.

O — USF&WS *Procedures Leading to Endangered Species Act Compliance for the Northern Spotted Owl* ("Guidelines"), dated July 1990.

P — USF&WS Memorandum issued October 2, 1991, rescinding Guidelines.

Q — Memorandum Order of the U.S. District Court for the District of Columbia dated February 27, 1992, regarding USF&WS's recission of the Guidelines.

R — Final Order of Bureau of Forestry ("BOF") dated January 19, 1993, affirming the State Forester's denial of Boise Cascade's amended plan for timber harvest.

S — Letter dated October 15, 1997, from the Oregon Department of Forestry to counsel for Boise Cascade.

T — Judgment entered by Clatsop County Circuit Court on December 24, 1997, in favor of Boise Cascade in the amount of $1,820,059, plus prejudgment interest.

U — Letter from the BOF's counsel to the USF&WS dated June 16, 1992, and cited in the BOF's Final Order (App. R) as indicating that Oregon law would not be satisfied if the USF&WS were to issue a decision finding that an Incidental Take Permit ("ITP") under the Endangered Species Act was not required.

V — Order of Oregon Court of Appeals in *Boise Cascade Corp. v. Board of Forestry* (CA A100855) dated January 6, 2000, granting in part Boise Cascade's Motion for Reconsideration.

W — Injunction Order dated July 28, 1997, in *United States v. Coast Forest Res. Ltd. P'ship*, U.S.D.C. Or. Civil No. 96-1575-HO, 2000 WL 298707 enjoining another timber owner because there was a spotted owl activity center approximately one mile away from the harvest site.

X — Complaint filed in *State of Oregon v. Int'l Paper Co.*, U.S.D.C. Or. Civil No. 93-6223-HO, dated July 1993.

Y — Letter dated December 10, 1997, from the federal government to counsel for Boise Cascade suggesting that Petitioner should apply for an ITP.

Z	Decree and Judgment entered on October 15, 1998, by the United States District Court for the District of Oregon in *Boise Cascade Corporation v. Michael J. Spear*, No. 97-1810-JO, granting the federal government an injunction prohibiting Petitioner from cutting any trees on its property unless it first obtained an ITP.
AA	Letter from the federal government's counsel to Boise Cascade dated July 30, 1999, concluding that the site had been abandoned by the owls, and notifying Boise Cascade that the government would not oppose dissolving the existing injunction.

PROCEDURES LEADING TO ENDANGERED SPECIES ACT COMPLIANCE FOR THE NORTHERN SPOTTED OWL

Including:

- o Formal Section 7 Consultation Guidance
- o Interim Recovery Strategy
- o Conservation Planning for Non-Federal Actions
- o Guidance for Incidental Take

U.S. Fish and Wildlife Service
Region 1
July 1990

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OWL PROCEDURES MANUAL

INTRODUCTION

With a listing decision now made for the northern spotted owl and an effective date of July 23, 1990, many people are wondering exactly what changes may occur to timber harvest programs in order to adequately protect the owl. In this document, the U.S. Fish and Wildlife Service (Service) describes its consultation, recovery, law enforcement (taking) guidelines, and conservation planning processes in an attempt to lay out procedures that are consistent with provisions of the Endangered Species Act (ESA), applicable on the effective date for listing of the northern spotted owl. With the cooperation of the other Federal agencies, as well as State and private entities, these guidelines outline the most efficient way of doing business under the ESA, at least for the first year after a listing, and would help meet the goals of other applicable laws and regulations.

PURPOSES

1. To provide clear examples of how ESA processes may work for the spotted owl.

2. To provide clarification of the Service's view of the Interagency Scientific Committee's (ISC) conservation strategy.

3. To put ESA spotted owl guidance in an understandable, manual-type format for distribution to Federal and non-Federal sectors as a working document.

BACKGROUND

- SECTION 7 OF THE ESA -- FORMAL CONSULTATION FOR FEDERAL ACTIONS

Federal agencies that fund, authorize, or carry out actions which "may affect" listed species must consult with the Service under Section 7. Federal actions that are nondiscretionary or that have "no adverse effects" on listed species are not subject to formal consultation. For timber harvest activities, the "may affect" standard applies to harvest activities within a ½ mile radius of any known nest site or pair activity center. The Service believes that these actions represent a threshold standard for timber activities requiring formal Section 7 consultation.

Formal consultation always results in a biological opinion issued from the service to the action agency. The opinion always makes a likely to jeopardize" or "not likely to jeopardize" finding for the action subject to formal consultation. The finding takes into account the environmental baseline condition of the listed species, plus the direct, indirect, interrelated, and interdependent effects attributable to the Federal action at hand, together with the cumulative effects of State and private actions reasonably certain to occur in the area of the Federal action.

Biological opinions may contain suggestions for project/action modifications, ranging from reasonable and prudent alternatives (only in a "jeopardy opinion") to reasonable and prudent measures/terms and conditions (mandatory elements of an incidental take statement) to conservation recommendations (suggestions which are left to the discretion of the action agency to implement).

Standards for the determination of incidental take are of particular significance to any future biological opinions for the northern spotted owl. Incidental take of listed species is "take" (as defined by the Endangered Species Act) that occurs incidentally to otherwise lawful activities. An obvious example of incidental take would be unknowingly cutting a tree which contained an owl nest with eggs or young.

The Service believes that incidental take also occurs for timber harvest activities which may harm or harass northern spotted owls. In order to define such activities which result in the most subtle type of incidental take, the Service convened a group of its biologists and developed incidental take guidelines which consider the biology of the owl throughout its range. Such guidelines are described later in this document.

o SECTION 9 AND 10 OF THE ESA -- TAKE FOR NON-FEDERAL ACTIONS

Take of endangered or threatened species is prohibited under Section 9 of the Endangered Species Act. The 1982 Amendments to the ESA gave the Service a procedure to authorize the incidental take of listed species by non-Federal parties in much the same way a Section 7 consultation (Incidental Take Statement) can authorize incidental take for Federal actions. Private parties whose otherwise lawful actions will result in incidental take of a listed species can apply for a permit authorizing such take by submitting a permit application and a Habitat Conservation Plan (HCP) to the Service.

Conservation Planning is a term that generally refers to the Section 10(a)(1)(B) permit process. This manual will go through the general procedures necessary for a private party to submit a properly prepared permit application for processing.

o SECTION 4 OF THE ESA -- RECOVERY STRATEGY

The Service will ultimately have an approved recovery plan for every listed species, as set forth in Section 4 of the ESA. Right now, there are approved recovery plans for less than one-half of all listed species. Recovery plans set forth goals which, once achieved, can result in delisting the subject species.

An approved recovery plan is not necessary to carry out formal consultation under Section 7, to consider permit applications under Section 10, nor to enforce the prohibitions of "take" under Section 9. Nevertheless, recovery plans are useful planning tools and may help guide and coordinate all conservation gained through Section 7 and Section 10, and focus such conservation actions on recovery and delisting. This manual will focus on the existing knowledge available, especially the ISC report, and make suggestions as to how the agencies can utilize such information as a potential recovery strategy.

DISCUSSION AND EXAMPLES

o FORMAL CONSULTATION UNDER SECTION 7

It is the responsibility of the action agency (e.g., Forest Service and Bureau of Land Management) to determine which actions "may affect" threatened or endangered species, and to initiate consultation with the Service. As noted above, "may affect" situations for the owl are defined as those activities that involve harvest or related activities within spotted owl habitat, and/or harvest activities which may pose disturbances to nesting pairs within ½ mile of any known nest site or pair activity center, regardless of the suitability of the habitat.

Suitable habitat selected by northern spotted owls was described in the (ISC) conservation strategy as typically exhibiting ". . . moderate to high canopy closure; a multilayered, multispecies canopy dominated by large overstory trees; a high incidence of large trees with large cavities, broken tops, and other indications of decadence; numerous large snags; heavy accumulations of logs and other woody debris on the forest floor; and considerable open space within and beneath the canopy. These attributes are usually found in old growth, but they are sometimes found in younger forests, especially those that contain remnant large trees or patches of large trees from earlier stands. In younger forests

that support breeding owls, the nest and major roost sites are usually found where large trees from the earlier, older stands remain." It is important to note that the age of forests is not as important a factor in determining habitat suitability as are vegetational and structural components. Areas where consideration of spotted owl habitat may be especially important in consultation are: 1) habitat that is currently occupied by owls, 2) Habitat Conservation Area as defined in the ISC conservation strategy, and 3) areas of special concern as defined in the Service's 1989 Status Review Supplement.

Once the action agency has made the "may affect" determination, a written request should be made to the Service for formal consultation. This request should be accompanied by an assessment of the action and its impacts, and contain the following general categories of information (a more detailed outline for a biological assessment is provided in Appendix 1):

1. a description of the action to be considered;
2. a description of the specific area that may be affected by the action;
3. a description of any listed species or critical habitat that may be affected by the action;
4. a description of the manner in which the action may affect any listed species or critical habitat and an analysis of any cumulative effects;
5. relevant reports, including any environmental impact statement or environmental assessment; and
6. any other relevant available information on the action, the affected listed species, or critical habitat.

After review of this information, the Service then prepares a biological opinion which includes:

1. an analysis of the direct and indirect effects, as well as the effects of interrelated and interdependent activities, and cumulative effects of reasonably certain State or private activities in the action area;
2. a biological opinion on whether the action is "likely to jeopardize" or "not likely to jeopardize" the continued existence of the species (reasonable and prudent alternatives will generally be provided if the opinion indicates that the proposed action is likely to jeopardize the continued existence of the species);
3. an incidental take statement which will identify the anticipated level of incidental take that will occur, and provide reasonable and prudent measures and terms and conditions for minimizing incidental take; and
4. conservation recommendations that, if implemented, would minimize impacts and promote the conservation of the species.

Reasonable and prudent measures and terms and conditions to minimize incidental take are mandatory, as are reasonable and prudent alternatives in a jeopardy opinion, and should be carried out by the action agency. Implementation of conservation recommendations, although strongly encouraged by the Service, is at the discretion of the action agency. A general outline for biological opinions is shown in Appendix 2.

The Forest Service and Bureau of Land Management (BLM) are considering dividing their sales into 3 categories for purposes of formal consultation:

1. all sold sales sold prior to FY-89;

2. planned and sold sales for FY-89 and 90 (Section 318 sales, and sales previously in conference); and
3. FY-91 planned sales.

Each Federal action "package" will result in a separate biological opinion issued by the Service to the Forest Service and the BLM (assuming both action agencies utilize similar consultation "packaging"). The Service is committed to issuing biological opinions on categories 1 and 2 within 30 days of receipt of the additional information necessary to complete the administrative record (and as close as possible to any effective date of a listing).

In each biological opinion the Service would provide conservation recommendations and an Incidental Take Statement (where appropriate) based on the Interagency Cooperation Regulations found at 50 CFR Part 402. To display possible results from such opinions, and assuming the occurrence of incidental take, we have prepared a list of examples of reasonable and prudent measures that would minimize or avoid incidental take, and listed conservation recommendations that are applicable to incidental take (see Table 1). We have further divided the list into two parts. Measures and recommendations that are (1) based upon the ISC Conservation Strategy or (2) based upon current management plans. Departure from these "example" reasonable and prudent measures and conservation recommendations may be advised, if through coordination with the Service, it is determined that sound biological data and reasoning indicate that the species would benefit from such a departure.

Appendices 3A and 3B provide examples of possible conservation recommendations, applicable under Section 7(a)(1), that may further promote the conservation of the species. Similarly, the first list (Appendix 3A) is based upon the ISC Conservation Strategy, while the second (Appendix 3B) is based

upon current management direction. These recommendations are not mandatory and are intended to provide an opportunity for the agency to further the conservation of the owl.

Comparisons between timber harvest actions "with ISC Strategy" and "without" were made at the request of the Department of the Interior. At the time of this writing, there are no other conservation strategies developed and presented for similar comparisons. If appropriate, future versions of this manual may analyze the likely conservation actions that would be called for under Section 7 if other, yet unknown, strategies were considered.

In the meantime, the ISC Conservation Strategy represents the most current management advice, developed through a multiagency working group that included the most knowledgeable owl experts. The strategy provides a long-term approach to owl management, consisting of major elements, that in combination comprise an integrated approach to conservation of the species. Deviations from the strategy in the short-term increase risk to its long-term success. Thus, the strategy provides a conservation goal against which all future actions will need to be measured. Since the strategy acknowledges the loss of habitat in conservation areas only through the 1990 sale program, it may be necessary to prepare a new or updated conservation strategy if the ISC's recommendations are not implemented in full prior to contracting 1991 sales.

Table 1. Examples of Reasonable and Prudent Measures Under Conservation in Incidental Take Statements for Federal Actions as Well as Applicable Conservation Recommendations

Reasonable and Prudent Measures and Conservation Recommendations Related to Incidental Take			
Sales Type	Limitations on Reasonable and Prudent Measures and Conservation Recommendations	Basis: Current Agency Management Plan Scenario	Basis: Agency Implementation of Interagency Scientific Committee Report

Sold Sales (pre-89 and FY-89/90 sold sales including sales under Section 318)	Sales are under contract, expense is high to modify contract.	Reasonable and Prudent Measures: Implement restrictions during the nesting season to protect pairs of spotted owls and their progeny. Conservation Recommendations: Protect pairs of spotted owls by adjusting unit boundaries, providing buffers, and use of forest practices which provide spotted owl habitat components.	Reasonable and Prudent Measures: Implement restrictions during the nesting season to protect pairs of spotted owls and their progeny. Conservation Recommendations: Protect pairs of spotted owls by adjusting unit boundaries, providing buffers, and use of forest practices which provide spotted owl habitat components.

(continued)

Sales Type	Limitations on Reasonable and Prudent Measures and Conservation Recommendations	Basis: Current Agency Management Plan Scenario Reasonable and Prudent Measures: Maintain adequate habitat within close proximity of pair sites and within their home ranges until a long-term conservation strategy is adopted. (See page 9, section on Incidental Take Guidelines under Sections 7 and 10.)	Basis: Agency Implementation of Interagency Scientific Committee Report Reasonable and Prudent Measures: Protect pairs of spotted owls within HCAs by providing a ½ mile buffer around the pairs activity center. Outside HCAs protect 80 acres surrounding pair activity centers (as specified in the ISC Strategy). Implement seasonal restrictions during the nesting season to protect pairs of spotted owls and their progeny.
1990 Planned but Unsold Sales, including Sales proposed under Section 318	Limited time available to make adjustments during the planning process and coordinate the changes before fiscal year 1990 contracting deadlines. Additional expenses may be necessary to make changes.		

Conservation Recommendations: Adopt the Interagency Scientific Committee Conservation Strategy, and eliminate or relocate timber harvest activities to areas outside proposed HCAs.

Conservation Recommendations: Eliminate or relocate timber harvest to areas outside HCAs.

(continued)

Sales Type	Limitations on Reasonable and Prudent Measures and Conservation Recommendations	Basis: Current Agency Management Plan Scenario	Basis: Agency Implementation of Interagency Scientific Committee Report
1991 and Future Sales	No known limitations	Reasonable and Prudent Measures: Maintain adequate habitat within close proximity of pair sites and within their home ranges until a long-term conservation strategy is adopted. (See page 9, section on Incidental Take Guidelines under Sections 7 and 10.)	Reasonable and Prudent Measures: Implement restrictions during the nesting season to protect pairs of spotted owls and their progeny that are located outside HCAs.

Conservation Recommendations: Adopt the Interagency Scientific Committee Conservation Strategy, and eliminate or relocate timber harvest activities to areas outside HCAs.

Conservation Recommendations: Protect pairs of spotted owls by adjusting unit boundaries, providing buffers, and use of forest practices which provide spotted owl habitat components.

It is not possible to determine an exact point at which the continued existence of a species would be at jeopardy without fully analyzing proposed actions in relation to the environmental baseline. Therefore, the Service will analyze each Federal action submitted for formal consultation in turn and will make the "likely jeopardy/not likely jeopardy" finding on a case-by-case basis.

o INCIDENTAL TAKE GUIDELINES UNDER SECTIONS 7 AND 10

The taking of any listed species is generally prohibited under Section 9 of the ESA and implementing regulations. There are, however, a number of exceptions to the taking prohibition.

The 1982 Amendments to the ESA gave the Service procedures to authorize the "incidental take" of listed wildlife species. These procedures are contained in Sections 7 and 10 of the ESA. "Incidental take" in this context is take which is "incidental to, and not the purpose of, carrying out otherwise lawful activities" (See 16 USC 1539 and Sec. 10(a)(1)(B) of the ESA).

The Service offers the following general guideance to address "incidental" take of northern spotted owls that may occur incidentally to timber harvest or related activities. The Service gives notice that any incidental take of northern spotted owls that results from activities carried out in a manner inconsistent with the guidelines (and not authorized under the provisions of Section 7 or Section 10 of the Act), will be subject to investigation by the Service pursuant to Section 9 of the Act.

It is important to note that the Service fully intends to consider all requests for incidental take authorizations under Section 7 (Federal) or Section 10 (State and private) of the Act, as appropriate. These interim guidelines are intended to present, to the best of our ability, guidance for addressing the need for

incidental take authorization; and therefore to provide guidance for reducing potential conflicts with Section 9 of the Act.

An obvious incidental take situation would exist if an otherwise lawful timber harvest activity would result in the direct loss of any individual (adult or young), or an active nest (with young or eggs). It is more difficult to determine when incidental take of owls might occur as a result of altering habitat surrounding a nest site or activity center of a pair of spotted owls.

Even more difficult is assessing when owls may be harmed or harassed by cutting within their home range. In these less obvious situations, the Service recommends that the project proponent initiate a dialogue with the Service to discuss the potential risk of incidental take. In the absence of such a dialogue, the Service offers the following stepwise approach which we believe is a reasonable procedure to reduce the risk that incidental take will occur. If the person engaged in timber harvest can demonstrate that these guidelines were followed, the Service does not intend to seek prosecution in the unlikely event that incidental take occurs in spite of implementing the guidelines.

The focus of our incidental take guidelines is on northern spotted owls, including their eggs and young. We therefore recommend the following stepwise approach to avoid and reduce the risk of incidental take:

1. Conduct spotted ow surveys during the breeding season and prior to any harvest activity according to the Forest Service protocols addressed in the Interagency Scientific Committee report. The Service may suggest other owl survey techniques in the near future. Such surveys should be a standard practice for planning timber harvest activities.

2. Avoid any harvest activity which results in less than 70 acres of the best suitable owl habitat encompassing the nest site and/or activity center of a pair of spotted owls.

3. Avoid any harvest activity which results in less than 500 acres of suitable habitat within a 0.7-mile radius (1000 acres) of a nest site and/or activity center. The 500 acres may include the 70 acres in No. 2 above and should be as contiguous as possible.

4. Avoid any harvest activity which results in less than 40 percent coverage by suitable owl habitat within a circle with a radius centered on a nest site/or center of activity and as prescribed by physiographic province (see Table 2). The 40 percent may include the acreage required in No. 2 and No. 3 above.

The Service recognizes that there is variation among individuals. Specific information on home range size, habitat use, nest site, or the center of activity of well-studied owls in similar habitat in the same portion of the range could be used to justify an exception to these guidelines and continue to avoid incidental take. In addition, habitat use information on which the above recommendations are based (see ISC 1990, USDI 1990) may change as a result of more recent studies, and the Service will continue to update its database to ensure that the most recent information is included.

To summarize the procedures for pursuing incidental take authorization for non-Federal activities, if incidental take is identified as a concern on State or private lands, individual landowners should consider development of a habitat

conservation plan. The Section 10 (a)(1)(B) permit application can be submitted separately by individual applicants or through the appropriate State agency as described in the discussion on Section 10 permits in this document. The Service strongly encourages a pre-application dialogue with any potential permit applicant at any time.

Table 2. Calculations to Develop Incidental Take Guidelines Based Upon Home Range Size by Physiographic Province[1]

Province	Median Home Range Size		40 Percent of Median Home Range Size
	Acres	Radius	Acres
WASHINGTON			
Olympic Peninsula	9900	2.2 miles	3960
Cascades	6600	1.8 miles	2640
OREGON			
Cascades	2500	1.2 miles	1000
Coast Range	3400	1.3 miles	1360
Klamath	2500	1.2 miles	1000
CALIFORNIA			
Klamath	2500	1.2 miles	1000

[1] The Service will continue to revise this table as more data become available.

References:

Interagency Scientific Committee. 1990. Conservation strategy for the northern spotted owl. Report of the Interagency Scientific Committee to address the conservation of the northern spotted owl. U.S. Department of Agriculture, Forest Service, and U.S. Department of the Interior, Fish and Wildlife Service, Bureau of Land Management, and National Park Service. Portland, Oregon.

U.S. Department of the Interior. 1990. 1990 Status Review. Northern Spotted Owl. Report to the U.S. Fish and Wildlife Service. Portland, Oregon.

o HABITAT CONSERVATION PLANNING UNDER SECTIONS 9 AND 10

A permit from the Service pursuant to Section 10(a)(1)(B) of the ESA authorizes incidental take much as a Section 7 consultation does through an "Incidental Take Statement" for Federal actions. However, Section 10 of the ESA typically applies to non-Federal actions. Individuals, corporations, non-Federal government entities, States, and other parties can apply for an incidental take permit by submitting an application and a habitat conservation plan to the Service. "Conservation Planning" is the term often used to refer to this process. In the case of the owl, the Service recommends maximizing efficiency of effort by developing a habitat conservation plan which includes the incidental take requests for a number of entities through the appropriate State land-managing agency.

The issuance of an incidental take permit by the Service is contingent upon the applicant's development of a Service-approved conservation plan for the listed species affected by the subject project or action (a more detailed document, "Draft

Conservation Planning Guidelines," is available from the Service's Portland Regional Office). Such a conservation plan must specify:

1. the anticipated impacts likely to result in take of listed species;
2. the mitigation and monitoring measures the applicant will undertake to alleviate the impacts of the taking;
3. alternative actions to such taking that were considered;
4. why these alternatives were not employed;
5. funding that will be provided to implement the mitigation measures and attendant conservation plan; and
6. additional measures that the Service may require as necessary or appropriate for the conservation of the species.

Because applicants may have difficulty in adequately addressing these conservation planning needs independently, the Service generally works with an applicant throughout the pre-application phase. Adequate quantification of impacts (i.e., incidental take) usually requires that the applicant: (1) define the conservation planning area, (2) collect necessary biological data on the species of concern, and (3) detail the proposed activities likely resulting in incidental take.

Upon receipt of the application and conservation plan, the Service may issue an incidental take permit if it determines that the following conditions have been met:

1. the taking will be incidental to the action;
2. the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of taking;

3. the applicant will ensure that adequate funding will be provided for the conservation plan and procedures to deal with unforeseen circumstances;
4. the taking will not appreciably reduce the likelihood of the survival and recovery of the subject species in the wild;
5. the applicant will ensure that other measures required by the Service will be provided; and
6. the plan will be implemented.

The third item above generally requires the development of an implementing agreement, which is a legal document binding all implementing parties to the proposed conservation plan.

The Service must also address the National Environmental Policy Act (NEPA) in the ESA Section 10(a)(1)(B) permit process. In most cases the Service delegates the development of information needed for preparation of NEPA documentation to the applicant to expedite the process. In general, if the incidental take permit will result in a significant net loss of individuals and/or habitat, an EIS likely will be required. This often adds 9 months to 1 year to the process. Conversely, if the permit will result in a net gain or insignificant net loss of individuals and/or habitat, an environmental assessment leading to a finding of no significant impact likely will be sufficient for NEPA compliance. In such a scenario, a permit could be considered for issuance in as little as 3 months.

Section 10 and Northern Spotted Owls

Timber harvest on State and private lands may result in the incidental take of northern spotted owls. Because the States authorize private timber harvest, they may be party to take on private lands, as well as on State lands. In the absence of an incidental take permit, this take would be a violation of ESA.

The implications for the northern spotted owl are considerable, since a large portion of the total harvest volume in the owl's range comes from non-Federal lands. At least in California, important numbers of owls occur on private lands; there are fewer owls on private lands in Washington and Oregon.

There are two approaches to managing the Section 10 process for spotted owls. One is for the individual landowner to prepare an HCP and apply for an incidental take permit for his lands. The second is for the State to prepare an HCP for all state and private timber lands. The Service would prefer to proceed with the latter approach, since it would add efficiency to the conservation planning process.

The States of Washington, Oregon, and California are at different stages in this process. In Washington and Oregon, the Service has notified the States of their potential responsibilities and initial informational discussions are beginning. In California, the State Board of Forestry, Department of Forestry, Department of Fish and Game, industry representatives, and the Service have been meeting regularly since November, 1989.

The State of California is planning to prepare an HCP covering timber management throughout the range of the subspecies in the state. The California HCP and accompanying NEPA process probably may not be completed until sometime in 1991. During the interim period, the State would attempt to prevent take through a review process that supplements its existing timber harvest permit procedure. In the meantime, large industrial timber firms have indicated their intent to proceed with individual HCPs.

o RECOVERY PLANNING UNDER SECTION 4

Section 4(f) of the Endangered Species Act requires development and implementation of recovery plans for listed species.

Recovery actions are meant to arrest or reverse the species' decline and neutralize the threats to its survival so that its long-term survival in the wild can be ensured.

A recovery plan delineates, justifies, and schedules the research and management actions necessary to support recovery of the species. Coordination among Federal, State, local agencies, organizations, and private entities is essential. Although recovery plans do not commit manpower or funds, they must identify site-specific management actions, estimate the time frame and costs for recovery, identify research needs, and establish measurable goals for recovery.

A recovery plan contains three parts. Part 1 is an overview of the species, its biology, life history, habitat requirements, and discussion of the threats that have led to its listing as an endangered or threatened species. Part 2 identifies the Service's goals and objectives for recovery of the listed species. These are presented in a step-down outline that recommends the steps that should be taken to help recover and delist the species. In most cases these recommendations are research oriented. Any recommended management actions may require NEPA documentation prior to implementation. Part 3 provides an implementation schedule that identifies the key players and the costs associated with recommended projects.

Development of a recovery plan requires a public review process prior to approval of the plan. There are no specific time frames associated with the development of a recovery plan, and a plan is not necessary for the Service to conduct Section 7 consultation, carry out research and management activities, or identify goals and objectives for the species. If the Service follows the normal procedure for producing a recovery plan, it is anticipated that two years would be required to complete the necessary steps before a plan would be finalized. A process for developing a recovery plan under these circumstances is described in

Appendix 4. Specific guidelines that describe the recovery planning process are available from the Service.

Interagency Scientific Committee Conservation Strategy

The Fish and Wildlife Service, Forest Service, Bureau of Land Management, and the National Park Service entered into a charter under the 1988 Interagency Agreement on spotted owls to establish an Interagency Scientific Committee (Committee). This Committee was also recognized by Congress in Section 318 of Public Law 101-121. The purpose of this Committee was to assess all available information on the management and biology of the northern subspecies and recommend a strategy for the conservation of the northern spotted owl. The Committee submitted "A Conservation Strategy for the Northern Spotted Owl" to report to Congress and the four agencies on April 4, 1990. The Forest Service must report to Congress on its intentions towards management of the owl by September 30, 1990.

As noted above, the Committee has produced a scientifically credible strategy for the long-term viability of the northern spotted owl. The agencies have endorsed the science associated with this plan, and are presently reviewing it to determine its acceptability as an approach to managing the owl under their multiple-use responsibilities. The Committee has utilized the best scientific information available, including contact with or the participation of all the most knowledgeable spotted owl experts in the process to develop this strategy.

The Service believes that this report represents the most comprehensive and in-depth analysis of the data available. The Service fully endorses the scientific credibility of the report and its applicability as a management approach for the northern spotted owl. Given this, the Service is reviewing this document

for its applicability as a recovery plan under the Endangered Species Act (see Appendix 4).

This process followed to produce the ISC's plan has met two of the Service's requirements for development of a recovery plan. First, the most knowledgeable owl experts available, representing all major constituencies, were involved in its development. Secondly, the best available information was used to develop the strategy. Establishment of recovery goals, evaluation of the conservation strategy relative to these goals, and inclusion of a public review process would be required to complete the process.

In the interim, the Service strongly recommends that the agencies consider implementation of the conservation strategy, as fully described by the Committee. Acceptance and implementation of the strategy, as recommended, would provide a sound basis for Section 7 consultation, help address the issue of take on Federal and private lands, and reduce concern over the economic impacts of recovery and species management.

The conservation strategy includes a process for revision of the strategy as more and better information becomes available. In addition, the Service has recently established a coordinating committee under a 1990 interagency agreement (Attachment 5) with the States of California, Oregon and Washington, and the USDA Forest Service, Bureau of Land Management, and National Park Service. The intent of this new agreement is to provide a forum to coordinate the management and conservation of the northern spotted owl. The Services believes that these processes allow for an open and appropriate forum for consideration and inclusion of recovery goals, other issues that may arise, as well as adjustment of the strategy itself that may be required during its implementation.

CONCLUSION: OWL PROCEDURES MANUAL

The Tables and Appendices noted in the narrative are attached. The Owl Procedures Manual will be updated and augmented as new information becomes available. Components of future consultations, such as development of incidental take statements, will generally follow the direction of this manual, but may change based on new biological information and professional judgment.

APPENDICES

to

OWL PROCEDURES MANUAL

APPENDIX 1: Biological Assessment Information

In general, biological assessments for the pre-1989 and 1989-1990 timber sale programs should contain the following information. The Service will work with the agencies to identify the data needs for future sale reviews.

Biological Assessment Format

1. Introduction

   - Brief summary of the objectives of the Biological Assessment; reference the Forest plans or timber plans under which sales were prepared.

   - Address other listed species (species for which the "may affect" standard applies, or acknowledgement that such species have been consulted on separately).

2. Description of the Proposed Action

   - Description of the Forest Service's Pacific Northwest and Pacific Southwest Regions or the BLM Districts in Oregon including total acreage, description and amount of forested acres, and owl habitat information such as amount, distribution, etc., by land area under consideration. This information should be totalled by physiographic province and Forest or BLM District.

   - Description of the timber sale program being addressed.

- For pre-1989 sales, where discretionary authority is retained, provide the following information, totaled by physiographic province and Forest or BLM District:

  a. total number and volume of sales, and acreages by type (clearcut, shelterwood, amount and type of salvage, etc.)

  b. number and list of "no effect" sales and justification for this determination.

  c. number and list of "may affect" sales, including volumes and acreages of suitable and unsuitable habitat. - indicate in the two lists above those sales that are located fully or partially within HCAs, SOHAs, Areas of concern, and/or ODFW/BLM agreement sites.

- For 1989-1990 sales, provide the following information, totalled by physiographic province and Forest or BLM District;

  a. total number and volume of sales, and acreages by type (clearcut, shelterwood, amount and type of salvage, etc.);

  b. number and list of "no effect" sales and justification for this determination;

  c. number and list of "may affect" sales, including volumes and acreages of suitable and unsuitable habitat, for both discretionary and non-discretionary sales; also indicate if the sale has been surveyed 0, 3, or 6 times, and whether the sale complies with the 50-11-40 rule

d. indicate in the lists above, those sales that are located fully or partially within HCAs, SOHAs, Areas of Concern, and/or ODFW/BLM agreement sites.

e. description of other activities that may be subject to future Section 7 consultation.

3. Description of the Affected Environment

- Definition of spotted owl habitat and the amount in acres within each physiographic province, Forest and BLM District.

- Biological data on listed species (historical use, presence, potential use); information and/or other documents containing such information may be incorporated by reference

- Spotted owl information (from data bases, 1985 to Present) should include information on all owls, pairs and singles, and those unaffected by the timber sale programs.

4. Analysis of the Effects of the Action

- General description

- Direct and indirect effects such as habitat loss, dispersal habitat, number of owl pairs affected, etc. Indicate the amount of owl habitat (distinguish dispersal habitat when possible) proposed to be removed or altered (from partial harvest) in each physiographic province and Forest. This section should also include a summary analysis of effects on owl pairs from

any or all of the following: sales within 0.5 mile of activity centers/nest sites; sales within 2.1/2.5 miles (home ranges); sales within 2.1/2.5 miles, where habitat would be reduced to below the minimum used by owl pairs in that province; and sales within Areas of Concern, as described in the Service's 1989 Status Review on the owl. It is important that this summary reflect the cumulative impacts to an owl pair from all sales affecting the pair.

- Interrelated and interdependent actions such as roads, silviculture treatments, recreational projects, etc.

- Cumulative impacts - future State and private actions, especially when these activities would affect owl pairs with home ranges overlapping federal and state or private lands.

- Brief discussion of other listed species - provide an analysis of effects of the action to other listed species.

5. Alternatives Considered

- Brief discussion of alternatives for sale, etc.

- Describe conservation measures implemented to reduce or minimize impacts to spotted owls or habitat.

- Prepare a contingency plan for situations where owl pairs are found in active timber sales.

- Summary of program changes as a result of the above (for 318 package). Forest Service Region 5 will provide changes in the 1989-1990 sales program.

6. Conclusions (for the timber sale package submitted for formal consultation)

   - How will the action (package) affect each listed species:

     a. no adverse affect;
     b. may adversely affect; or
     c. may beneficially affect?

   -- Request consultation for those which may affect (adversely or beneficially).

Information Needs

To aid our analysis of impacts to owls in the biological opinions, and to complete our administrative record, the Service has requested that the agencies provide information, in a Table format, on owls and owl habitat.

- Number and list of owl pairs and singles (including those whose status is unconfirmed), by Forest or BLM District. This list should include those pairs whose home range or 2.1/2.5 miles radius circle overlaps adjacent state or private lands.

- For each owl pair affected by the program, provide the following information:

a. pre-harvest acres of suitable habitat available to the pair within 0.5 miles and between 0.5 and 2.1/2.5 miles.

b. acres of owl habitat removed within those distances, for each sale and for all sales (cumulative); and

c. whether the pair is located in an area of concern, HCA, SOHA, or ODFW/BLM Agreement area.

- Database tables for individual timber sales brought forward for consultation.

- Short narratives from each Forest and BLM District to address selected parts of the above outline and summarize the biological evaluations for each sale.

The following provides a description of the general format that the Service follows when it provides a biological opinion to an action agency under Section 7 of the ESA.

Biological Opinion Format

1. Introduction
   a. Identify the issue and species in consultation

2. Biological Opinion
   a. Succinct statement (...is/is not likely to jeopardize, ...will/will not adversely modify critical habitat) for each species.

3. Description of the Proposed Action
   a. Cite Public Notice, EIS, plan document, or rationale for packaging from biological assessment.
   b. Include interrelated, interdependent actions considered.

4. Species Account
   a. Status and biology of listed and proposed species.

5. Effects of the Proposed Action on Listed Species
   a. Cite past Opinions to same agency, recovery plans, Biological Assessments, etc., for species accounts.
   b. Include species information relevant to action area.
   c. Explain effects that are adverse or beneficial.
   d. If jeopardy, stress aspects that cause jeopardy.
   e. Provide a basis for reasonable and prudent alternatives, and/or conservation recommendations.

6. Cumulative Effects

7. Reasonable and Prudent Alternatives
   a. If appropriate, but only for jeopardy findings.

8. Incidental Take
   a. Include sections in order.
      1. anticipated incidental take.
      2. reasonable and prudent measures to minimize incidental take.
      3. terms and conditions necessary to implement reasonable and prudent measures.
      4. instructions on disposition of dead animals.
   b. See Table 1 in this document

9. Conservation Recommendations
   a. See Appendices 3A and B in this document.

10. Closing

11. Literature Cited

APPENDIX 3A: Section 7 Consultation - Example Conservation Recommendations likely to be Recommended if the Interagency Scientific Committee Conservation Strategy Serves as the Basis for Consultation

The Service will provide conservation recommendations under Section 7(a)(1). These recommendations are not mandatory, but are intended to assist the agency in implementing actions that may result in the conservation of the owl.

1. The Forest Service and Bureau of Land Management should coordinate with the Service to develop a tracking procedure that will monitor implementation of the sale program and document the following: the total number of owls impacted and at what levels; and the total amount of owl habitat removed from the environmental baseline.

2. Proposed sale areas and owl sites should be surveyed a minimum of 6 times within a given season to provide a reasonably accurate data base from which to make sound management decisions.

3. The Forest Service and Bureau of Land Management should coordinate with the Service and State resource agencies to design and conduct spotted owl research and monitoring efforts, including banding and telemetry programs and studies of habitat utilization.

4. Design, implement, and monitor timber harvest prescriptions to minimize impacts to the spotted owl and, in the long term, create or restore the necessary components of owl habitat. Consider testing the following prescriptions on a site specific basis, as appropriate:

a. Selectively harvest to retain a specified number of green trees per acre, thereby facilitating more rapid development of a multi-layered canopy.

b. Leave sufficient snags and down woody material to provide for the prey base requirements for spotted owls. Refer to the research paper by Spies, et al. (1988) for guidelines. Coordinate with fire and pest management specialists.

c. Burn post-harvest fuels only as necessary for fuel reduction and insect control. Retain large down logs where possible. Coordinate with fire and pest management specialists.

d. Treat stands of young trees to facilitate more rapid production of large trees and well-developed multi-storied stands.

e. Create or improve the decadent tree component by topping or girdling large trees. Coordinate with fire and pest management specialists.

f. Selectively harvest to encourage understory development while retaining overstory canopy closure of 40% or more.

    1. Leave sufficient green trees (at least 12 per acre, individually and in clusters of mixed species and ages) to serve as the upper canopy layer as habitat recovers its value for nesting, roosting, and foraging activities of spotted owls; and

g. Within shelterwood harvests, leave 8-15 mature trees per acre to provide the components of

spotted owl nesting, roosting, and foraging habitat. Eliminate the final overstory removal phase.

5. Work closely with adjacent Federal, State, and private landowners to properly manage spotted owl habitat on a landscape level, monitor owls and the effects of timber sale-related activities, and design sales to avoid adverse impacts to spotted owls.

6. Consider evaluating allowable sale quantities on an acreage basis in addition to a volume basis to provide increased flexibility in managing for spotted owls and other environmental values in terms of habitat capabilities.

7. Adjust the timber base through your planning process to account for habitat reserved or managed for the spotted owl to help assure its long term survival.

8. Consider reducing the annual allowable sale quantities to facilities implementation of the ISC Conservation Strategy and conserve spotted owl habitat.

9. Coordinate the funding, development, and maintenance of a geographic information system that is compatible between Federal and State land management and fish and wildlife resource agencies for the long-term tracking of spotted owls and their habitat.

APPENDIX 3B: Section 7 Consultation - General Conservation Recommendations Likely to be Recommended if the Interagency Scientific Committee Conservation Strategy does Not Serve as the Basis for Consultation

These recommendations are based upon the Service's knowledge of current management scenarios being pursued by the Forest Service (SOHA system) and Bureau of Land Management (ODFW agreement areas).

1. Eliminate or relocate the timber sales/units that are within 0.5-miles of a pair, and/or would reduce the amount of owl habitat to less than the minimum known to be used by owl pairs in each province.

2. Eliminate or relocate timber sales/units in areas of special concern (as identified in the Service's 1989 Status Review) unless an interagency plan for the conservation of dispersal habitat has been implemented.

3. Prioritize timber sales so that sales not impacting spotted owl pairs and/or spotted owl habitat are contracted first. Sales which have a minor impact should be contracted second, and sales that have a major impact should be offered last and only when absolutely necessary.

4. The Forest Service and Bureau of Land Management should coordinate with the Service to develop a tracking procedure that will monitor implementation of the sale program and document the following: the number and kinds of recommendations that are implemented; the total number of spotted owls impacted and to what degree; and the total amount of spotted owl habitat removed from the environmental baseline.

5. Proposed sale areas and owl sites should be surveyed a minimum of 6 times within a given season to provide a reasonably accurate data base from which to make sound management decisions.

6. The Forest Service and Bureau of Land Management should coordinate with the Service and State resource agencies to design and conduct spotted owl research and monitoring efforts, including banding and telemetry programs and studies of habitat utilization.

7. Management plans should be developed, in coordination with state and Federal wildlife agencies and the Forestry Sciences Labs, to provide for the long-term development and maintenance of nesting, foraging, and dispersal habitat necessary to maintain the northern spotted owl. Particular attention should be paid to avoiding impacts to spotted owls and restoring habitat within the identified areas of special concern.

8. Timber harvest activities should be minimized within relatively large, contiguous blocks of spotted owl habitat. Consider aggregating, instead of dispersing, these activities within the forest landscape, to avoid increasing fragmentation of remaining spotted owl habitat. Allow for changes in harvest prescription, from clearcut to commercial thinning or individual tree marking, to preserve necessary owl habitat components.

9. Design, implement, and monitor timber harvest prescriptions to minimize impacts to the spotted owl and, in the long-term, create or restore the necessary habitat components of owl habitat. Consider testing the following prescriptions on a site specific basis, as appropriate:

a. Selectively harvest to retain a specified number of green trees per acre, thereby facilitating more rapid development of a multi-layered canopy.

b. Leave sufficient snags and down woody material to provide for the prey base requirements for spotted owls. Refer to the research paper by Spies, et al. (1988) for guidelines. Coordinate with fire and pest management specialists.

c. Burn post-harvest fuels only as necessary for fuel reduction and insect control. Retain large down logs where possible. Coordinated with fire and pest management specialists.

d. Treat stands of young trees to facilitate more rapid production of large trees and well-developed multi-storied stands.

e. Create or improve the decadent tree component by topping or girdling large trees. Coordinate with fire and pest management specialists.

f. Selectively harvest to encourage understory development while retaining overstory canopy closure of 40% or more.

- Leave sufficient green trees (at least 12 per acre, individually and in clusters of mixed species and ages) to serve as the upper canopy layer as habitat recovers its value for nesting, roosting, and foraging activities of spotted owls; and

- Within shelterwood harvests, leave 8-15 mature trees per acre to provide the

components of spotted owl nesting, roosting, and foraging habitat. Eliminate the final overstory removal phase.

10. Work closely with adjacent Federal, State, and private landowners to properly manage spotted owl habitat on a landscape level, monitor owls and the effects of timber sale-related activities, and design sales to avoid adverse impacts to spotted owls.

11. Consider evaluating allowable sale quantities on an acreage basis in addition to a volume basis to provide increased flexibility in managing for spotted owls and other environmental values in terms of habitat capabilities.

12. Adjust the timber base through your planning process to account for habitat reserved or managed for the spotted owl to help assure its long term survival.

13. Consider reducing the annual allowable sale quantities to facilitate implementation of the ISC Conservation Strategy and conserve spotted owl habitat.

14. Coordinate the funding, development, and maintenance of a geographic information system that is compatible between Federal and State land management and fish and wildlife resource agencies for the long-term tracking of spotted owls and their habitat.

APPENDIX 4: Recovery Strategy

Approach 1: If the agencies implement the ISC conservation strategy as a management plan for the northern spotted owl, the Service can use this approach as an interim recovery plan while the strategy is being assessed through the recovery planning process for its applicability and acceptability as a formal recovery plan. Therefore, the Service recommends the following approach:

June/July 1990

- The agencies indicate their acceptance and intentions towards implementation of the Conservation strategy.

- The Service will convene a group of recognized experts (which may include members of the Scientific Committee and the Listing Review Team) to review the strategy in relation to the requirements and mandates of the Endangered Species Act and the feasibility of adopting the ISC plan for recovery planning purposes.

July 1990

- A report will be provided to the Service on the applicability of the ISC Conservation Strategy as a recovery plan.

- The Service will announce a decision to proceed with the recovery planning process using either the Conservation Strategy or another approach.

  - If the Conservation Strategy is appropriate as a recovery plan, the Service will pursue its obligations to consider public input prior to

finalization of the document as a recovery plan and to complete the planning processes.

- If the Service decides to pursue development of another recovery planning document, procedures described in Approach 2 would be followed.

January 1991

o Finalize and approve recovery plan (if the ISC strategy is the recommended approach).

Approach 2: If the Service follows a normal process for developing a recovery plan, it is recommended that a "classic" scientific recovery team be established for the owl. Through the ISC team effort and the Listing Review Team there are a number of highly qualified persons identified as good candidates to serve on the Team. As a mechanism for the science of recovery to interface with land management concerns, the Team Leader should participate in the Interagency Northern Spotted Owl Conservation Group (formally ISOC) meetings. The ISC report provides a good starting point for a recovery plan; the Service will need to look closely at this document in establishing recovery goals and objectives.

July 1990

o Send out letters to agencies, universities, etc. requesting nominations to recovery team. Expertise will be sought in the following areas:

1. northern spotted owl ecology,
2. conservation biology,
3. population genetics,
4. population ecology,

5. biogeographical modeling with expertise in geographic information systems; and
6. old growth forest management.

August 1990

- Select recovery team, and schedule first team meeting.

September 1991

- Complete draft recovery plan for public review and comment.

March 1992

- Finalize and approve a recovery plan.

April 1992 and Beyond

- Implement the recovery plan. This could be done using an implementation team approach. Representatives would include those from: Forest Service, Bureau of Land Management, State wildlife agencies, State forestry departments, timber industry, and environmental groups.

- A management oversight group and technical group could be formed to advise the Service (oversee) research and management actions affecting recovery of the northern spotted owl.

APPENDIX 5: 1990 Interagency Agreement (attached)

MEMORANDUM OF AGREEMENT

AMONG

STATE OF CALIFORNIA
THE RESOURCES AGENCY

STATE OF WASHINGTON
DEPARTMENT OF WILDLIFE,

STATE OF OREGON
DEPARTMENT OF FISH AND WILDLIFE,

U.S. DEPARTMENT OF THE INTERIOR
FISH AND WILDLIFE SERVICE,
BUREAU OF LAND MANAGEMENT,
NATIONAL PARK SERVICE,

AND

U.S. DEPARTMENT OF AGRICULTURE
FOREST SERVICE

TO ESTABLISH AN INTERAGENCY
NORTHERN SPOTTED OWL CONSERVATION GROUP

This Memorandum of Agreement ("Memorandum") is entered into this 13th day of April, 1990, among the State of California Resources Agency, the Oregon Department of Fish and Wildlife, the Washington Department of Wildlife, the U.S. Fish and Wildlife Service, the USDA Forest Service, the Bureau of Land Management, and the National Park Service (collectively called the "Public Agencies").

WHEREAS, all parties to this Memorandum of Agreement recognize that they each have responsibilities under

their statutory authorities that cannot be delegated and that this Memorandum cannot and is not intended to abrogate any of their independent decision-making responsibilities, and

WHEREAS, the Public Agencies are among the Federal and State agencies that have regulatory authority or responsibility under certain Federal and State statutes to manage for the northern spotted owl (Strix occidentalis caurina) and its habitat, and

WHEREAS, the multiple sources of authority under which the Public Agencies operate do not provide any individual agency with the authority to implement a comprehensive program to provide for the long-term conservation of the northern spotted owl across its historic range, and

WHEREAS, the Federal Agencies have entered into an interagency agreement to cooperate in ensuring the conservation of the spotted owl, and

WHEREAS, the Public Agencies desire that their activities, to fulfill their respective responsibilities with regard to the conservation of the northern subspecies of the spotted owl, be coordinated in such a manner as to ensure effective, timely, and mutually beneficial use of financial and personnel resources, and

WHEREAS, the Public Agencies share the common goal of ensuring the conservation for the northern spotted owl,

THEREFORE, it is mutually agreed and understood that:

PURPOSE OF MEMORANDUM

The Public Agencies have entered into this Memorandum to establish an Interagency Northern Spotted Owl Conservation

Group to develop and ensure compliance with cooperative programs related to the conservation of the northern spotted owl.

INTERAGENCY NORTHERN SPOTTED OWL CONSERVATION GROUP

Secretary, State of California, The Resources Agency

Director, State of Washington, Department of Wildlife

Regional Director, U.S. Fish and Wildlife Service, Portland, Oregon

Regional Forester, U.S. Forest Service, Portland, Oregon

Director, Pacific Northwest Experiment Station, Portland, Oregon

Regional Forester, U.S. Forest Service, San Francisco, California

State Director, U.S. Bureau of Land Management, Portland, Oregon

State Director, U.S. Bureau of Land Management, Sacramento, California

Regional Director, National Park Service, San Francisco, California

Regional Director, National Park Service, Seattle, Washington

Director, State of Oregon, Department of Fish and Wildlife

OPERATION

1. The Regional Director of the U.S. Fish and Wildlife Service shall chair the Interagency Northern Spotted Owl Conservation Group (Interagency Group) for a period of 2 years from the date of execution of this agreement. Chairperson of the Interagency Group shall rotate on an annual basis among the participating agencies. Future chairpersons will be chosen by the Interagency Group.

2. The Interagency Group will meet as frequently as agreed upon by a majority of the voting members. Meetings shall be called by the Chairperson.

3. The Interagency Group may establish, or rely on, existing coordinating or working groups, as necessary or appropriate, to address specific issues relative to northern spotted owl conservation.

RESPONSIBILITIES

1. Identify, consider, and recommend, as appropriate, management and research activities for the conservation of the northern spotted owl.

2. Direct activities of any coordinating or working groups established by the Interagency Group.

3. Exchange information, coordinate, and provide standards and guidelines for needed management, monitoring, and research activities related to the conservation of the northern spotted owl.

4. Serve as a discussion forum for and liaison with all interest groups to serve as a common source of information and to address identified problems or conflicts.

5. TERM AND AMENDMENTS

This agreement is subject to all applicable laws and regulations. This Agreement may be amended upon the written consent of all parties. Parties to this Agreement may withdraw from this Agreement at any time upon written notice to the Interagency Group chair.

All signatories to this Memorandum agree to seek mutually agreeable solutions to achieve its purposes.

IN WITNESS WHEREOF, THE PARTIES HERETO have executed this Memorandum, on the date(s) set forth, as of the day and year last written.

Memorandum of Agreement to Establish an Interagency Northern Spotted Owl Conservation Group

By /s/ unreadable Date April 13, 1990
Director, State of Oregon
Department of Fish and Wildlife
Portland, Oregon

By /s/ unreadable Date April 13, 1990
Director, State of Washington
Department of Wildlife
Olympia, Washington

By /s/ David M. Jay Date 4-13-90
for Regional Forester
U.S. Forest Service
San Francisco, California

By /s/ unreadable Date 4-13-90
Regional Forester
U.S. Forest Service
Portland, Oregon

By /s/ unreadable Date 4/13/90
Director
Pacific Northwest Experiment Station
Portland, Oregon

By /s/ unreadable Date April 13, 1990
Regional Director
U.S. Fish and Wildlife Service
Portland, Oregon

By /s/ unreadable Date April 13, 1990
for State Director
U.S. Bureau of Land Management
Sacramento, California

By /s/ Elaine Y. Zelinski Date April 13, 1990
for State Director
U.S. Bureau of Land Management
Portland, Oregon

By /s/ unreadable Date April 19, 1990
for Regional Director
National Park Service
San Francisco, California

By /s/ unreadable Date April 13, 1990
Acting Regional Director
National Park Service
Seattle, Washington

By /s/ unreadable Date April 19, 1990
Secretary, State of California
The Resources Agency
Sacramento, California

United States Department of the Interior
FISH AND WILDLIFE SERVICE

911 N.E. 11th Avenue
Portland, Oregon 97232-4181

October 2, 1991

Memorandum

To: Field Supervisor, Fish and Wildlife Enhancement Field Office
Sacramento, California (Attn: Wayne S. White)

Field Supervisor, Fish and Wildlife Enhancement Field Office
Portland, Oregon (Attn: Russell D. Peterson)

Field Supervisor, Fish and Wildlife Enhancement Field Office
Olympia, Washington (Attn: David C. Frederick)

Spotted Owl Coordinator, Fish and Wildlife Enhancement Region 1. Portland, Oregon (Attn: Barry Mulder)

From: Assistant Regional Director-Fish and Wildlife Enhancement

Subject: Northern Spotted Owl Guidelines for Compliance with the Endangered Species Act

The July 1990 document titled "Procedures Leading to Endangered Species Act Compliance for the Northern Spotted

Owl," is hereby rescinded. We will investigate the need for a regulation.

/s/ H. Dale Hall

cc:
Regional Solicitor's Office
(Attention: Ron Swan)

FILED
FEB 27 1992
Clerk, U.S. District Court
District of Columbia

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SWEET HOME CHAPTER :
OF COMMUNITIES FOR A :
GREAT OREGON, et al., :

Plaintiffs, :

v. : Civil Action No. 91-2218

JOHN F. TURNER, :
Director, U.S. Fish and :
Wildlife Service, et al., :

Defendants. :

MEMORANDUM ORDER

Plaintiffs in this case challenge certain guidelines issued by the United States Fish and Wildlife Service ("FWS") in 1990 which interpret the extent of timber harvesting activities that are permitted under the Endangered Species Act ("ESA"), 16 U.S.C. § 1531-1544 (1988). On October 2, 1991, the Assistant Regional Director for FWS of Region 1, in which plaintiffs are located, issued a memorandum rescinding the disputed guidelines. Federal defendants have now moved the Court to dismiss the case on mootness grounds. Upon consideration of defendants' motion, plaintiffs' opposition, the supporting memoranda of the

parties, and the entire record herein, the Court will hereby grant defendants' motion to dismiss.

BACKGROUND

In July 1990, Region 1 of the FWS issued a document entitled "Procedures Leading to Endangered Species Act Compliance for the Northern Spotted Owl" ("Guidelines"). In order for individuals to comply with the ESA, the Guidelines require them to refrain from timber harvesting in certain areas surrounding nest sites or activity centers of the northern spotted owl. On April 19, 1991, plaintiffs served defendants with a Notice of Intent to Sue letter, pursuant to section 10(g) of the ESA, 16 U.S.C. § 1540(g); plaintiffs then filed this action, on August 30, 1991, challenging the Guidelines as arbitrary and capricious and contrary to the statutory authority of the ESA and the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4332 (1988). The complaint requests this Court to declare that the Guidelines are inconsistent with the law, to set aside the Guidelines and remand them to FWS, and to enjoin FWS from applying the Guidelines.

On October 2, 1991, the Assistant Regional Director for Fish and Wildlife Enhancement of Region 1 issued a Memorandum to regional Field Supervisors advising them that the Guidelines had been rescinded and that FWS was "investigat[ing] the need for a regulation." On the basis of this memorandum, defendants now claim that this case is moot.

DISCUSSION

Under the two-prong test set out by the Supreme Court in County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979), a dispute is moot if (1) there is no reasonable expectation that the alleged violation will recur, and (2) "interim relief or events have completely and irrevocably eradicated the effects of the alleged

violation." Although voluntary cessation of allegedly illegal conduct will not ordinarily deprive a court of the power to hear and decide a case, United States v. W.T. Grant Co., 345 U.S. 629, 632 (1953), where a defendant can meet the burden imposed by Davis, the controversy is nonjusticiable.

Here, defendants have voluntarily rescinded the challenged Guidelines. They have represented that they "will investigate the need for a regulation," but they have not indicated what shape any such future regulation might take. Although the Court cannot deny that there is a possibility that FWS might reinstate the Guidelines or issue a regulation which in essence reinstates them, such a possibility is, for the moment, merely speculative.[1] It certainly does not rise to the level of a "reasonable expectation." This Circuit has in the past refused to adjudicate a controversy involving allegedly unlawful agency regulations, where the secretary of an agency has subsequently withdrawn them:

> Although the road reclamation requirement [the challenged regulation which was withdrawn by the Secretary of the Interior] is certain "capable of repetition," if and when the Secretary repromulgates [the regulation], the regulation will be reviewable at that time. . . . It would be entirely inappropriate for

---

[1] Plaintiffs have offered nothing to support their speculation that the Guidelines might be reissued other than a newspaper article which makes it clear that the Guidelines have been rescinded. See Exhibit 2 to Plaintiffs' Mem. in Opp. to Defendants' Motion to Dismiss. The article also reports the possibility of new FWS regulations in the future, and one FWS spokesman states that "we still stand by our recommendations." Plaintiffs offer this statement as proof that FWS intends to reissue the Guidelines. However the spokesman's comment is made in the context of FWS' continued commitment to enforcement of the Endangered Species Act. This Court will not accept a statement taken out of context from a newspaper article as proof that FWS intends to reinstate the Guidelines.

> this Court to do as [plaintiff] suggests and issue an advisory opinion to guide the Secretary's rulemaking.

National Wildlife Federation v. Hodel, 839 F.2d 694, 742 (D.C. Cir. 1988).

By rescinding the Guidelines, FWS has provided plaintiffs with the relief they sought in their original complaint. In the prayer for relief in their complaint, plaintiffs ask the Court to declare the Guidelines contrary to law, set them aside, remand them to FWS, and enjoin FWS from seeking to apply them. Essentially, plaintiffs are seeking to prevent enforcement of the Guidelines. That is precisely what FWS has now done: FWS declared that the Guidelines were rescinded, thereby clearly indicating its intention no longer to apply or enforce them. Plaintiffs argue that the effects of the Guidelines have not been completely eradicated because many state enforcement policies were predicated on the Guidelines, and these state policies are still in place. However, it is entirely likely that these states, confronted with a rescission of the Guidelines, will abandon their Guideline-based enforcement policies. Plaintiffs also claim that FWS has so vigorously promoted the Guidelines that state officials feel FWS had put "a gun to their heads" to compel compliance. Even if this is true -- and again, plaintiffs offer only the quote of one state official from a newspaper article as evidence -- FWS effectively withdrew that gun when it rescinded the Guidelines.

The Court concludes that, through defendants' rescission of the Guidelines, there is now no reasonable expectation that the injuries alleged in plaintiffs' complaint will recur. A case should be dismissed as moot where, as here, "the possibility of continuing injury disappears while the lawsuit is pending." Committee in Solidarity with the People of El Salvador v. Sessions, 929 F.2d 742, 744 (D.C. Cir. 1991). Moreover, plaintiffs have received essentially all of the relief they originally

sought in their complaint. Thus, the Court will grant defendants' motion to dismiss this case for mootness.

Accordingly, it is this 26th day of February, 1992,

ORDERED that defendants' motion to dismiss be, and hereby is, granted; and it is further

ORDERED that this case be, and hereby is, dismissed.

/s/ Norma Holloway Johnson
NORMA HOLLOWAY JOHNSON
UNITED STATES DISTRICT JUDGE

BEFORE THE BOARD OF FORESTRY
OF THE STATE OF OREGON

In the Matter of Boise	) DOJ Case No.
Cascade's Walker Creek	) 629-430-NR002-92
Timber Harvest Operation	) Hearings Case No.
Plan	) 92-DOF-007

FINAL ORDER

Statement of the Case: On February 4, 1992, Boise Cascade Corporation, referred to as "Boise Cascade" hereinafter, submitted a written plan concerning a proposed harvesting operation in the Walker Creek area of Clatsop County. The plan was denied. On May 5, 1992, Boise Cascade submitted an amended written plan. The amended written plan was denied on May 15, 1992. Boise Cascade requested a hearing on June 12, 1992. A hearing was held in Salem, Oregon on October 20, 1992. Melinda L. Bruce and Jerome S. Lidz, Assistant Attorneys General, represented the Department of Forestry ("ODF"). Attorney Phillip D. Chadsey of Stoel Rives Boley Jones & Grey represented Boise Cascade. Charles Stone, Richard Skipper, Clint Smith and William A. Dryden appeared as witnesses. The Department of Forestry filed a post-hearing memorandum on November 4, 1992. Boise Cascade filed a reply memorandum on November 13, 1992.

A Proposed Order was served on the parties on December 17, 1992. Attorney Chadsey filed exceptions on behalf of Boise Cascade. The Oregon State Board of Forestry met in regular session on January 6, 1993, at the State Forester's Headquarters in Salem, Oregon. Melinda Bruce and Phillip Chadsey presented argument to the Board. After considering the record, the Board did approve and adopt the Hearing Officer's Proposed Order.

Legal Issue: Should the amended written plan for the proposed Walker Creek timer harvest operation be approved under the Forest Practices Act and OAR 629-24-809?

Hearing Officer's Findings of Fact: (1) Boise Cascade is a publicly held forest products company which owns and operates sawmills, plywood plants, and pulp and paper mills in Oregon. It also owns and manages commercial timberlands for the purpose of supplying wood to those facilities. (2) In October 1988, in a trade of commercial timberlands with Longview Fiber Corporation, Boise Cascade acquired some commercial timberlands in Clatsop County. (3) Boise Cascade subsequently harvested some timber from the lands and in October 1991 arranged a sale of all its Clatsop County lands to another company, Hampton. (4) A 64 acre parcel located in the SW 1/4, Section 6, Township 6 N., Range 6 N., was excluded from the sale. That parcel is referred to as the Walker Creek Unit hereinafter. (5) That property is presently and at all pertinent times has been zoned as commercial timberlands. (6) In 1988 the Oregon Department of Fish and Wildlife ("ODFW") declared the spotted owl to be a threatened species, although no protective measures were adopted at that time. (6A) As early as 1986, a male spotted owl had been observed on the Walker Creek Unit. In 1990, a pair of spotted owls nested and successfully hatched two young owls on the property. (7) In 1991, a Boise Cascade survey identified a singe female in the area. No nesting activity was observed.

(8) On January 7, 1992, Boise Cascade filed Notification Number 92-521-11022 giving notice to the State Forester of its intent to conduct an operation and harvest timber on the Walker Creek Unit. (8) Because of the location of protected waters on or near the unit and the unit's identification as spotted owl habitat, a written plan was required. (9) Boise Cascade filed the written plan on February 4, 1992. (10) The plan provided that, if a pair of owls nested in the operations area, no operations would be conducted during the critical period of use, March 1 to September 30, or until the young owls fledged. (11) The written plan was denied approval on February 24, 1992, on the ground that it failed to describe how the operation would be conducted to provide a 70 acre core area of suitable owl habitat consistent with the requirements of OAR 629-24-809.

(12) On May 5, 1992, Boise Cascade submitted an amended written plan. (13) The plan reported that a pair of spotted owls was then known to be nesting in a tree within the harvest area, although it was different from the nest site observed in 1990. (14) The plan provided that Boise Cascade would not conduct operations in the area while the owls were present. (15) With respect to habitat, the plan stated that there were more than 70 acres of commercial timberland immediately adjacent to Boise Cascade's property and owned by the State of Oregon which could provide habitat for the owls after the Boise Cascade property had been logged. None of these properties encompassed the nest site. (16) On May 15, 1992, approval of the amended written plan was denied on the stated ground that the plan filed to identify for protection a 70 acre area of suitable spotted owl habitat encompassing the nest site. (17) Forest Practices Forrester ("FPF") Richard E. Skipper's letter of denial made reference to a recent field inspection conducted by himself, Clint Smith, a wildlife and fisheries specialist with ODF, and Bosie Cascade's agent, during which 70 acres of suitable habitat was identified and which included 47 acres of Boise Cascade's Walker Creek Unit and 23 nearby acres on lands owned by a private owner and by the state. (18) The letter advised Boise Cascade that there were eight acres in the unit outside the designated suitable habitat that could be harvested or that the entire unit could be harvested if an incidental take permit was approved by the United States Fish and Wildlife Service ("USFWS").

(19) In August 1990, the Oregon State Forester adopted an interim administrative policy precluding timber harvest within a 70-acre core area of the best available spotted owl habitat around known nest sites or activity centers. (20) The 70-acre core area requirement was based on a similar requirement in the USFWS guidelines adopted after that agency on June 23, 1990 declared the spotted owl a "threatened species" under the federal Endangered Species Act. (21) The Oregon State Board of Forestry subsequently adopted OAR 629-24-809, which requires protection

of a 70-acre core area of suitable habitat encompassing the nest site.

(22) Following a public hearing on February 28, 1991, on March 29, 1991, a hearing officer filed with the State Forester a document entitled "Report of Hearing Officer, Summary of Testimony, Findings and Conclusions," which was concerned with the Board of Forestry's proposed Forest Practice Rule for protection of Northern Spotted Owl nest sites when conducting forest operations on state and private lands. (23) In October 1991, the USFWS rescinded its guidelines pertaining to spotted owls on privately owned lands. (24) On January 6, 1992, Melinda L. Bruce, Assistant Attorney General of the Natural Resources Section, sent a letter to Ted Lorensen, Unit Manager for Technical Support (Monitoring and Policy) for the ODF, advising him that the recision of the federal guidelines concerning the northern spotted owl had no effect on the validity of OAR 629-24-809.

(25) On June 3, 1992, Boise Cascade's representative, Bill Dryden, sent FPF Skipper a letter. (26) On June 16, 1992, Jerome Lidz, Assistant Attorney General, sent a letter to Dale Hall of USFWS, in which he stated that ODF did not purport to be acting under the authority of the federal Endangered Species Act in enforcing its Forest Practices rules. The letter further stated that a decision by the USFWS that no incidental take permit was required under federal law would not satisfy the Oregon administrative rule which allowed the issuance of such a permit by the USFWS as an alternative means of complying with state law. (27) On July 29, 1992, Assistant Attorney General Lidz sent a letter to Phillip Chadsey, counsel for Boise Cascade.
(28) Subsequent to denying Boise Cascade's plan to log the Walker Creek Unit, the State of Oregon has advertised for sale commercial timber on land that it owns in Clatsop County approximately one and a half miles from the Walker Creek Unit. The timber, which is to be clear cut, consists mostly of hardwoods that are not suitable owl habitat. (29) Adult spotted owls may live

in a habitat that encompasses an area that has a radius of more than one and a half miles.

Conclusion and Reasons: The written plan was properly denied under the Forest Practices Rules. The plan fails to comply with the requirements of OAR 629-24-809.

OAR 629-24-809 provides as follows:

> (1) Whenever the State Forester determines that an operation will conflict with protection of a nesting site of the northern spotted owl . . . , the operator must obtain the State Forester's approval of a written plan before commencing the operation. The written plan, at a minimum, must address how the operation will be conducted to provide for the following:
>
> > (a) A 70-acre area of suitable spotted owl habitat encompassing the nest site, to be maintained as suitable spotted owl habitat;
> >
> > (b) Prevention of disturbances resulting from operation activities which cause owls to flush from the nesting site. Such disturbances must be prevented during the critical period of use for nesting. The critical period of use is the time period between March 1 and September 30, each year.
>
> (2) For the purposes of this rule, nesting site means and includes the tree, when known, containing a spotted owl nest; or when not specifically known, includes an activity center of a pair of adult spotted owls. An activity center is a location determined by the State Forester to

have been reliably identified as being occupied by an adult pair of spotted owls, capable of breeding. Such determination must be supported by repeated observation of the owls in close proximity or observation of nesting behavior.

(3) (a) For the purposes of this rule, suitable spotted owl habitat means and includes:

(A) A stand of trees with moderate to high canopy closure (60 to 80 percent); multi-layered, multi-species canopy dominated by large overstory trees (greater than 30 inches in diameter at breast height); a high incidence of large trees with various deformities (e.g., large cavities, broken tops, and other evidence of decadence); numerous large snags; large accumulations of fallen trees and other woody debris on the ground; and sufficient open space below the canopy for owls to fly; or

(B) In the absence of habitat which exhibits all the characteristics listed above, the available forested habitat which comes closest to approximating the listed conditions.

(b) Stands which do not exhibit at least two of the characteristics listed in paragraph (a)(A) in this section are not suitable habitat.

(4) (For information only) Federal law prohibits a person from taking northern spotted owls. Taking under the federal law may include significant

> alteration of owl habitat on any class of land ownership. Compliance with subsection (1) of this rule is not in lieu of any federal requirements related to the federal Endangered Species Act.
>
> (5) Exceptions to the requirements for protecting northern spotted owl nesting sites may be approved by the State Forester if the operator has obtained an incidental take permit from federal authorities under the federal Endangered Species Act.

OAR 629-24-695 states that the goal of resource site protection is "to ensure that forest practices do not lead to resource site destruction, abandonment or reduced productivity." For spotted owls, the resource site is the nesting site. (OAR 629-24-800).

Boise Cascade's written plan was rejected because it did not identify for protection a 70 acre area of suitable spotted owl habitat encompassing the nest site. The plan did not specifically identify any suitable spotted owl habitat, as defined in OAR 629-24-809(3); it simply stated that there was more than 70 acres of state-owned "commercial timberland immediately adjacent to the harvest area" which could provide habitat for the spotted owls after the Boise Cascade land had been logged. The nest site located on Boise Cascade's land was necessarily excluded from that habitat. At hearing Boise Cascade did not attempt to present evidence that it intended in the written plan to protect the nest site; in fact it acknowledged its intention in the planned operation to destroy the nest tree after the critical nesting period. Under the rule, the written plan could not be approved as submitted.

<u>The Board of Forestry did not exceed its authority in adopting OAR 629-24-809</u>.

In ORS 527.630 the legislature stated the policy of the Forest Practices Act as follows:

> (1) Forests make a vital contribution to Oregon by providing jobs, products, tax base and other social and economic benefits, by helping to maintain forest tree species, soil, air and water resources and by providing a habitat for wildlife and acquatic life. Therefore, it is declared to be the public policy of the State of Oregon to encourage economically efficient forest practices that assure the continuous growing and harvest of forest tree species and the maintenance of forestland for such purposes as the leading use on privately owned land, consistent with sound management of soil, air, water, fish and wildlife resources and scenic resources within visually sensitive corridors as provided in ORS 527.755 that assures the continuous benefits of those resources for future generations of Oregonians.

In ORS 527.710 the legislature mandated that the Board of Forestry adopt administrative rules to carry out the purposes of the Forest Practices Act, to assure the continuous growing and harvesting of forest tree species and, consistent with ORS 527.630, to provide for the overall maintenance of air quality, water resources, soil productivity and fish and wildlife.

In addition to those specified rulemaking duties, the statute required the Board to collect and analyze the best available information and establish inventories of resource sites needing protection, including threatened and endangered species identified on lists that are adopted, by rule, by the State Fish and Wildlife Commission or are federally listed under the federal Endangered Species Act. Recognizing the potential conflicts between forest practices and resource sites, the Board was required to analyze such conflicts and adopt rules appropriate to protect such resource sites. The statute further required the Board to consult with other state agencies having functions with respect to the purposes specified in ORS 527.630 and to accommodate their rules and

programs to the extent deemed by the Board to be appropriate and consistent with the purposes of ORS 527.630.

The Board's authority to enact OAR 629-24-809 is clear under the above statutes. Boise Cascade's argument that rules enacted under these statutes are invalid if they prevent or impede the growing or harvesting of any trees at any time on private lands is simply not rational. The statute explicitly recognizes inevitable conflict between forest practices, which include by statutory definition the harvesting of forest tree species, and resource site protection. The Board was required to adopt rules for resource site protection.

Neither does the rule exceed in scope the authority delegated to the Board of Forestry. The identified resource sites would not be protected from destruction, abandonment or reduced productivity if the site were maintained only during the period of critical use. The site is protected so that it might shelter and promote the continued existence of the threatened species; it is not, as Boise Cascade would have it, that a particular specimen of a threatened species is protected so that it can create a new resource site. The ODF's interpretation of its statutory mandate is consistent with the plain language of that mandate. The interpretation proposed by Boise Cascade is contrary to that plain language.

The evidence also establishes that in adopting OAR 629-24-809 the Board used what it believed to be the best scientific evidence available. Nothing in the statutory mandate excluded from consideration information gathered for purposes of enforcing the federal Endangered Species Act.

Finally, there is nothing substantial in the record to support Boise Cascade's arguments that the Board of Forestry improperly delegated authority to the USFWS; that the Board shifted enforcement of the state's endangered species protection laws to the federal government; or that the Board shifted the burden of northern spotted owl protection from state lands to private lands.

OAR 629-24-809 is not invalid under the Oregon and United States constitutions. Both Article I, Section 18, of the Oregon Constitution and the Fifth and Fourteenth Amendments to the U.S. Constitution prohibit the state from taking private land for a public use without just compensation to the landowner. Boise Cascade argues that the referenced rule is invalid under those constitutional provisions and cites as authority the recent U.S. Supreme Court decision, Lucas v. South Carolina Coastal Commission, 505 US ___,112 S Ct 2886, 120 L Ed 2d 798 (1992).

Boise Cascade appears to have been undecided as to the appropriate time to advance this argument. Although it asserts in its Reply Memorandum that such an argument is not premature, it did not at hearing attempt to present evidence that any "taking" had in fact occurred. It was established that spotted owls had been observed on the property prior, to its purchase by Boise Cascade and that the ODFW had declared the spotted owl to be a threatened species in the year of purchase. There was also evidence that the 64 subject acres were part of a much larger tract of forestland, some of it contiguous to the Walker Creek Unit, and that Boise Cascade harvested timber from some of that acreage before late 1991 , when it sold off all its Clatsop County lands except the subject unit. The value of the harvested timber and the consideration received in the sale of adjoining acreage to Hampton were not established and Boise Cascade objected to any questions directed to establishing such facts. Boise Cascade's reasonable commercial expectations might well have been realized or surpassed. Certainly there is an inadequate factual basis upon which to advance any claim of a constitutional taking.

FINAL ORDER

Approval of the amended written plan submitted by Boise Cascade for its proposed Walker Creek Unit timber harvest operation,

Notification Number 92-521-11022, was properly denied under the Oregon Forest Practices Act and OAR 629-24-101 et seq.

/s/ James E. Brown

JAMES E . BROWN
STATE FORESTER and
SECRETARY to the BOARD OF
FORESTRY

Dated this 15th day of January, 1993.

You are entitled to judicial review of the Final Order. Judicial review is by the Oregon Court of Appeals pursuant to the Provisions of ORS 183.482. Judicial review may be obtained by filing a petition for review with the Office of State Court Administrator, Supreme Court Building, Salem, Oregon, 97310, within 60 days from a service of the Final Order.

Oregon
DEPARTMENT OF
FORESTRY

STATE FORESTER'S
OFFICE

"STEWARDSHIP IN
FORESTRY"

October 15, 1997

Mike Hicks
Boise Cascade Corporation
450 Pacific Avenue
Monmouth, Oregon 97361

Dear Mike:

Through routine surveying and tracking of northern spotted owls conducted by the Department of Forestry's Lands Management Program, it has recently been determined that the parcel of forestland retained by Boise Cascade Corp. (when it sold off other holdings to Agency Creek in 1991)on Walker Creek, located at SW 1/4 Section 6, T6N, R6W, in Clatsop County, no longer fits the criteria for being designated as a northern spotted owl nesting site as used in OAR 629-665-210 (formerly OAR 629-24-809).

For the purposes of this rule, nesting site means the tree, when known, that contains the nest, or when not known, the activity center, of a pair of adult spotted owls. Of the pair that previously occupied the Walker Creek site, the female was found dead last winter, and the male was recently observed at the Buster Quarry site more than eight miles away. No responses to surveying were registered this past season at the Walker Creek site.

In 1992, Boise Cascade filed notifications and written plans with the department for harvesting at this site. The written plan for a portion of the tract was denied because it did not adequately address the protection of a 70 acre area of suitable habitat around the nesting site. With the information that we have now regarding the site, if a notification were filed for harvest on this area, there would be no requirement for a written plan under the Forest Practices Act based on the existence of a northern spotted owl nesting site. Of course, any other requirements for written plans, such as operating within 100 feet of a fish-bearing stream, would still apply.

Although this parcel no longer qualifies as a northern spotted owl nesting site under the Oregon Forest Practices Act, I do not know how it will be regarded by the U.S. Fish and Wildlife Service under the Endangered Species Act. Federal law prohibits a person from taking northern spotted owls. Taking under the federal law may include significant alteration of owl habitat on any class of land ownership. You may wish to consult with Fish and Wildlife Service officials before deciding any further course of action at the Walker Creek location. The Department of Forestry will be informing the U.S. Fish and Wildlife Service of our determination by copy of this letter.

Sincerely,

/s/ Charlie Stone
Charlie Stone
Forest Practices Director

CHS:na
cc: Members of the Oregon Board of Forestry
James E. Brown, State Forester
Russell Peterson, Regional Director, USFWS
Paula Burgess, Governor's National Resources Assistant
William Cloran, Asst. Attorney General
Phillip D. Chadsey, Stoel Rives, LLP

FILED
CLATSOP CIRCUIT COURT
97 DEC 24 PM 1:37
TRIAL COURT ADMINISTRATOR

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF CLATSOP

BOISE CASCADE CORPORATION, a Delaware corporation,	)	
Plaintiff,	)	No. 93-2018
v.	)	MONEY JUDGMENT
STATE OF OREGON, by and through THE OREGON STATE BOARD OF FORESTRY,	)	
Defendant.	)	

The claims presented in this case have been fully and finally adjudicated as follows:

Plaintiff's First Claim for Relief for Inverse Condemnation under the Oregon Constitution was voluntarily dismissed on plaintiff's own motion.

On Plaintiff's Second Claim for Relief - Count Two (Lucas Per Se Claim - U.S. Constitution), the court ordered that summary judgment be entered in favor of plaintiff.

On Defendant's Alternative Counterclaim (Declaratory Judgment) the court declares that the taking was temporary and defendant did not acquire a fee interest in plaintiff's property.

Finally, Plaintiff's Second Claim for Relief - Count One (Loretto Per Se Claim - U.S. Constitution) was submitted to the jury which found in favor of plaintiff and against defendant.

Based on the jury's special interrogatory verdict in this action, dated November 21, 1997, plaintiff's damages in this action are as follows:

1.	January 15, 1993 Fair Market Value	$2,279,233
2.	Interest at the statutory legal rate of 9 percent per annum from the date of the taking, January 15, 1993, to the date the taking was lifted, October 17, 1997 (as determined by the court)	$1,156,251
3.	Sum of 1 and 2	$3,435,484
4.	October 17, 1997 Fair Market Value	$1,615,425
5.	Just Compensation for Temporary Taking of Plaintiff's Timber for period from January 15, 1993 to October 17, 1997 (3 minus 4)	$1,820,059

THEREFORE, IT IS ORDERED AND ADJUDGED that plaintiff shall have judgment against defendant as stated below.

MONEY JUDGMENT

A.	Judgment Creditor:	Boise Cascade Corporation
B.	Judgment Creditor's Attorney:	Phillip D. Chadsey, OSB No. 66028
C.	Judgment Debtor:	State of Oregon
D.	The amount of the judgment:	$1,820,059.00
E.	Pre-judgment Interest:	None
F.	The judgment creditor is owed interest on $1,820,059.00 at the rate of 9 percent per annum from October 17, 1997.	
G.	Costs:	Costs shall be determined following entry of judgment pursuant to ORCP 68 C.

DATED this 24 day of December, 1997.

/s/ Paula Brownhill
Paula J. Brownhill

Circuit Court Judge

SUBMITTED BY:
Phillip D. Chadsey, OSB No. 66028
Of Attorneys for Plaintiff

DEPARTMENT OF JUSTICE
GENERAL COUNSEL DIVISION
Justice Building
Salem, Oregon 97310
Telephone: (503) 378-6986
FAX: (503) 378-3784

June 16, 1992

Dale Hall
U.S. Fish and Wildlife Service
911 Northeast 11th
Portland, OR 97232

Re: Boise Cascade Operation Plan in Clatsop County
DOJ File No. 629-430-NR0092-92

Dear Mr. Hall:

This office represents the Oregon Department of Forestry (ODF). We have received a copy of the letter to you dated May 27, 1992, from Phil Chadsey, representing Boise Cascade Corporation (Boise). Although we do not intend to ask you to referee a debate on the Endangered Species Act or the Oregon Forest Practices Act, some clarification of ODF's position and intention is necessary, because Mr. Chadsey's letter substantially misstates them. He implies that ODF is acting under authority of the federal Endangered Species Act; in fact, ODF is simply enforcing state law -- specifically, its Forest Practices rules.

ODF has not "established as a condition of logging the site that Boise Cascade obtain an incidental take permit from your agency." Rather, because Boise's written operation plan failed to meet the state's regulatory requirements for protecting spotted

owl habitat, ODF referred Boise to an administrative rule that authorizes the State Forester to grant an exception to the state's habitat protection rules if the appropriate federal agency has issued an incidental take permit. (Presumably, the rule reflects a policy of giving careful consideration to another government agency's decision that an operator has taken adequate alternative steps to protect habitat.) Without implying agreement with Mr. Chadsey's interpretation of the Endangered Species Act or any disinterest in USFWS's interpretation of the Act and implementing rules, interpretation of federal law is simply not an issue under the Oregon Forest Practices Rules.

The purpose of referring Boise to the alternative standard for protecting spotted owl habitat is not to shift responsibility to the federal government for the inverse condemnation claim that Boise has threatened to file. Instead, as I explained in the previous paragraph, we consider ODF's decision in this matter to be governed by Oregon law. Your agency's action is significant only to the extent that, if you grant an incidental take permit, the State Forester is then authorized to grant an exception to ODF's habitat protection rules. A decision that no incidental take permit is required under federal law would not meet the requirements of the Oregon administrative rule.

I hope this clarifies the state's position. If you have any questions, please do not hesitate to call.

Sincerely,

/s/ Jerome Lidz

Jerome Lidz
Assistant Attorney General
Natural Resources Section

JSL:tmt/JGG037FA

c: The Honorable Thomas L. Sansonetti
Office of the Solicitor
U.S. Department of the Interior
1849 C Street, N.W.
Washington, DC 20240
Phillip D. Chadsey
Stoel Rives Boley et al
900 SW Fifth Avenue, Ste. 2300
Portland, OR 97204-1268

IN THE COURT OF APPEAL
OF THE STATE OF OREGON

BOISE CASCADE CORPORATION, a Delaware corporation,	)	Clatsop County Circuit Court No. 93-2018
Plaintiff-Respondent,	)	CA A100855
v.	)	**ORDER GRANTING MOTION TO TAKE JUDICIAL NOTICE AND DENYING PETITION FOR RECONSIDERATION**
STATE OF OREGON, by and through the Oregon State Board of Forestry,	)	
Defendant-Appellant.	)	

Respondent has moved for the court to take judicial notice of the following documents pursuant to OEC 201(b) and (d): (1) Complaint for Declaratory Relief, filed in July 1993, in *State of Oregon v. International Paper Co.*, Civil No. 93-623-HO, U.S. District Court for the District of Oregon; (2) Order of the U.S. District Court for the District of Oregon, filed July 27, 1998, in *United States v. West Coast Forest Resources*, Civil No. 96-1575-HO; (3) Opinion and Order of the U.S. District Court for the District of Oregon, filed April 1, 1998, in *Boise Cascade Corporation v. Spear*, Civil No. 97-1810-JO; (4) Decree and Judgment, filed and entered October 15, 1998, enjoining respondent from further timber logging on its Walker Creek Unit without an incidental take permit; (5) Complaint in mandamus, filed December 10, 1998, against the Oregon state supervisor of USF&WS in *Boise Cascade Corporation v. Peterson*, Civil No. 98-1538; (6) Transcript of proceedings in *Peterson* mandamus action, February 5, 1999; (7) Letter from Samuel D. Rauch, III, to Phillip D. Chadsey, dated July 30, 1999, and (8) Letter from USF&WS to Mr. Chadsey, dated July 30, 1999. The motion to

take judicial notice is denied as to items (7) and (8); the motion is granted as to all other documents.

Respondent has petitioned for reconsideration of the court's opinion issued on November 10, 1999. The petition is denied.

JAN 6 2000
Date

/s/ Paul J. De Muniz
PAUL J. DEMUNIZ,
Presiding Judge

c: Phillip L. Chadsey
David F. Coursen
Daniel H. Kearns
John M. Groen

REPLIES SHOULD BE DIRECTED TO THE STATE COURT ADMINISTRATOR, RECORDS SECTION, SUPREME COURT BUILDING, 1163 STATE STREET, SALEM, OR 97310

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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
EUGENE, OREGON
By /s/ unreadable

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA,	)
	)
Plaintiff,	) Civil No. 96-1575-HO
	)
v.	) ORDER
	)
WEST COAST FOREST RESOURCES LIMITED PARTNERSHIP and DEANS MT. LOGGING CO.,	)
	)
Defendants.	)
	)

The United States brought this suit to permanently enjoin the clearcut harvest of ninety-four acres of privately owned forest land in Lane County, Oregon, known as the Good Hominy Unit ("the Unit"). On July 28, 1997, this court denied the motion for permanent injunction and instead issued a temporary injunction for one year, in order to maintain the status quo until further research could be completed. The court ordered plaintiff to commence radiotelemetry monitoring of a pair of owls known as the "Chickahominy Pair" ("the owls," or "the pair"). Now before the court is plaintiff's motion for permanent injunction (#109). The court heard oral arguments and the presentation of evidence on November 9, and 10, 1999.

I. Summary of Evidence Presented

A. Testimony of Dr. Forsman

The United States presented the testimony of Dr. Eric Forsman, a Research Wildlife Biologist employed by the United States Forest Service, Pacific Northwest Research Lab in Corvallis, Oregon. Dr. Forsman opined that, although he cannot predict with absolute certainty whether harvesting the Unit would cause the owls to leave the site, it is reasonably certain that harvesting the Unit is likely to "significantly impact" the reproductive rates of the pair and its ability to survive on the current site. Dr. Forsman opined that harvesting the Unit will harm the pair by reducing the prey supply and causing an inability to roost in the Unit. He explained the chain of events that could lead to the owls' death: (1) clearcut; (2) prey in the area becomes no longer available; (3) reduction in prey forces owls to forage elsewhere; (4) the owls must expend more energy to find food; and (5) the owls could potentially starve to death, produce fewer young because of less food, or even be predated due to risky travel to other sources of food.

He acknowledged that if there was still enough habitat and prey after harvesting, there would be no significant effect on the owls. Dr. Forsman used a 75% Adaptive Kernal ("AK") method in determining the "core area." He found that the Unit was within the 75% AK for the male, but not for the female. He opined that 14% of the landscape inside the home range consists of older forests, and that 21% of the sightings from the study were in the older forests. He opined that 56% of the landscape is pole young and broad leaf, and that 60% of the sightings were in this tree type. He concluded that the older forests were used more than expected based on their availability. Based on prior research of other areas, Dr. Forsman opined that owls with 20% or less of old forest produced far fewer young than those with 60% or more.

Dr. Forsman's definition of "suitable habitat" included areas where owls are able to replace themselves. Dr. Forsman acknowledged that the telemetry study revealed that pole young and broadleaf were used for roosting and foraging by the owls, but opined that other studies of other sites indicates that pole young and broadleaf are not suitable habitat.

Dr. Forsman acknowledged the pair's recent high reproductive rate of .86, and that the increase occurred despite previous clearcuts in the area, but opined the high reproductive rate is not indicative of survivability because it is within a relatively short period of time.

B. Testimony of Dr. Ramsey

The government presented the testimony of Fred L. Ramsey, Ph.D., a professor of statistics at Oregon State University. Dr. Ramsey testified as to the relevancy of defendant's decision to change the boundaries of the proposed harvest. Following the telemetry study, defendant changed the boundaries to avoid areas containing numerous telemetry points. Dr. Ramsey opined that changing the Unit's boundary has no statistical validity. He further testified that without knowing habitat differences, no inference can be drawn from the fact that one area contains seven telemetry points, and another contains only one. Dr. Ramsey explained that the models created from the telemetry study are descriptive, not predictive, and that if there is no difference in habitat, then one could assume the points would be dispersed differently next time. Dr. Ramsey acknowledged that there may be a missing variable.

C. Testimony of Dr. Rosenberg

The government presented the testimony of Daniel K. Rosenberg, Ph.D., an assistant professor of wildlife ecology in the Department of Fisheries and Wildlife at Oregon State

University. Dr. Rosenberg opined that it is reasonably certain that harvesting the Unit will significantly impact the reproduction and survival of the owls, and may lead to site abandonment. He explained that old forest is sparse in the Oregon Coast Range, the Unit includes old forest, and the telemetry study indicated a strong selection for older forests over pole young. Dr. Rosenberg noted that the Unit is highly associated with owl usage; it was clearly selected for foraging, particularly by the male owl. He acknowledged that the owls use pole young and broad leaf trees, but "not necessarily proportionate to their availability." He opined that pole young and broad leaf are not suitable habitat.

Dr. Rosenberg, in referring to the telemetry study, stated that the owls were almost three times more likely to select a stand within the Unit, rather than outside the Unit. He opined, "There's something about the Unit [that they prefer]." He stated that there could be other unknown variables present making the Unit "special."

He agreed with Dr. Ramsey that there is no reason to believe a revision of the Unit would be consequential, but that there may be an unidentified variable not accounted for. He further noted that the owls' main source of prey is the flying squirrel, and that accessibility to, rather than abundance of, prey is most important. He opined that there is no significant difference in the abundance of flying squirrels in old or new forests.

Dr. Rosenberg stated that a threshold of 30% of old forest must be met for survival of owls. He asserted that he did not find it surprising, but rather, encouraging, that despite the relatively low percentage of old forest currently in the area, the owls have recently experienced a higher than average reproductive rate. In addition, in acknowledging that other nearby pairs whose habitats include higher percentages of old

forests have experienced lower reproductive rates than the pair in the past three years, Dr. Rosenberg explained that reproductive rates are variable, and could be the product of other effects.

Dr. Rosenberg reasoned that his conclusion as to a detrimental effect on the owls can be made with reasonable certainty because: (1) the Unit is within the owls' home range; (2) the Unit is likely within the owls' core area; (3) the Unit contains portions of preferred old forest; (4) preferred old forests are already very limited in the owls' home range; (5) the owls are selecting the Unit; and (6) studies of other owls indicate that owls in areas with less than 30% older forest perform poorly.

Dr. Rosenberg stated that the telemetry study was descriptive in that it provided the parties with information as to the owls' home range and provided data that is consistent with general knowledge of owl behavior. He stated that using the data from the study, and combining that data with information known regarding the type of habitat and elevation suitable for owls allows researchers to predict future usage.

D. Testimony of Dr. McDonald

Defendant presented the testimony of Trent L. McDonald, Ph.D., a biomatrician employed by Western Ecosystems Technology, Inc., in Cheyenne, Wyoming. Dr. McDonald opined that the following factors are relevant variables in owl habitat selection: elevation, distanced to water, distance from the nest, and vegetation type. Dr. McDonald utilized these factors in creating "resource selection function" models, and concluded that, when all the factors that influence owl use are

integrated together, the area within the Unit is not significant to the owls.[1]

E. Testimony of Dr. Irwin

Defendant presented the testimony of Larry L. Irwin, the Wildlife Program Manager employed by the National Council for Air and Stream Improvement. Dr. Irwin noted that relevant factors include elevation, distance to the nest site, and vegetation types. Dr. Irwin opined that harvesting the Unit will not affect the owls' essential life functions. He reasoned that: (1) there is sufficient suitable habitat even without the Unit; (2) these particular owls have had a relatively high reproductive rate; (3) the Unit is far from the nest site, and therefore, the likelihood of future use is low due to distance and elevation factors; and (4) the only recorded use of the Unit was by the male for foraging, and he will forage elsewhere if the Unit is not available.

Dr. Irwin opined that the threshold amount for suitable habitat for owl survival is 20%. He further noted that the owls are selecting pole young and broad leaf, and thus, these vegetation types must be included as suitable habitat. Based on this premise, he opined that there is over 70% suitable habitat available in the home range, and harvesting the Unit will remove only approximately 5% of the total suitable habitat. He further noted that from 1991 through 1998, the reproductive rate of the owl pair was .86 per year, as compared to other owls in the coast range which average .65 - .70 per year. Dr. Irwin acknowledged that the Unit has some suitable habitat, but opined that if the Unit was unavailable other resources would still be available. He

[1] The court notes that defendants' experts generally referred to the new Unit boundaries, whereas plaintiffs' experts generally referred to the old Unit boundaries. The court's conclusion is the same regardless of which boundaries are considered.

concluded that clearcutting the Unit would affect the owls' foraging "very minimally."

F. Testimony of Mr. Carson

Defendant presented the testimony of Robert G. Carson, a wildlife biologist for Mason Bruce & Girard, who performs "take" evaluations. He opined that pole young and broad leaf trees are suitable habitat. He reasoned that, according to the telemetry study, pole young trees were used 32% of the time, and broad leaf trees were used 24% of the time. He noted that old forest was used 21% of the time. He opined that the total amount of suitable habitat in the owls' home range is 64%.

He further reasoned that if the owls truly had available only 20% suitable habitat, then the expected reproductive rate would be .4, but that it is much higher. In referring to his table indicating the reproductivity of the owl pair as compared to other pairs in the coast range, the pair ranked 24th out of 133 pairs in high reproductive rates. He concluded that harvesting the Unit would not affect foraging and roosting behavior of the owls.

Mr. Carson acknowledged his previous opinion in September 1996 that broad leaf was not considered suitable, but explained that this previous opinion was based on a vegetation-based definition, but now that the telemetry study has been completed, a use-based definition of suitable habitat is more appropriate. This use-based definition indicates that broadleaf is suitable habitat. Whereas in 1996 he opined that there was 26% suitable habitat in the owls' home range, now, based on the use-based definition of suitable habitat which indicates that broad leaf should be included, he concluded that there is 65-70% suitable habitat in the owls' home range.

II. Findings of Fact

The court reaches the following findings of fact based on the evidence presented in both the initial and subsequent hearings. The court does not repeat findings already stated in this court's July 28, 1997, order. Unless otherwise indicated due to these findings being made with the benefit of further studies following this court's prior order, this court's prior findings are incorporated herein.

The Unit is within the home range of the owl pair. The 95% Adaptive Kernal home range for the pair is approximately 3602 acres. The size and shape varies from year to year regardless of whether the Unit is cut.

The pair is actually using the Unit, primarily for foraging by the male owl.

The telemetry study revealed that the owls used older forests in a higher percentage than their availability. Pole young and broad leaf were also used heavily by the owls for foraging and constitute "suitable habitat" for these owls.[2]

When including pole young and broad leaf as suitable habitat for this owl pair, there is 60-70% suitable habitat located within the pair's actual home range.

The reproductive rate of these owls from 1991 through 1998 was .86 young per year, as compared to other owls in the coast range which average .65 - .7 per year.

---

[2] The court states no opinion as to whether pole young and broad leaf may constitute "suitable habitat" in other circumstances. Rather, the court must consider all circumstances of each individual case to determine what is suitable habitat.

III. Standard for Issuance of Permanent Injunction

Under section 9 of the Endangered Species Act ("ESA"), it is unlawful for any person to "take" an endangered or threatened species. 16 U.S.C. § 1538(a)(1). The court previously concluded that the northern spotted owl is a threatened species, and a primary reason for the bird's decline is the loss of suitable habitat. See Order dated July 28, 1997. "Take" includes actions that "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." Id. § 1532(19). The Secretary of the Interior has further defined "harm" as follows:

> "Harm" in the definition of "take" in the Act means an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering.

50 C.F.R. § 17.3.

The burden is on the government to establish to a reasonable certainty that the proposed harvest will result in significant habitat modification that actually kills or injures the owls by significantly impairing the owls' essential behavioral patterns, including breeding, feeding, or sheltering. See 50 C.F.R. § 17.3

To establish "harm" from habitat modification, plaintiff must show "significant impairment of the species' breeding or feeding habits and prove that the habitat degradation prevents, or possibly, retards, recovery of species." National Wildlife Federation v. Burlington Northern Railroad, Inc., 23 F.3d 1508, 1512-13 (9th Cir. 1994).

The harm that is imminent must be the death or actual injury of an identifiable species. "Mere speculation" is not sufficient; there must be "a definite threat of future harm to [a] protected species." Burlington, 23 F.3d at 1512 n.8.

Both parties agree that harvesting the Unit will at least affect the male owl's foraging in light of the evidence that the male owl has used the Unit for foraging on various occasions. Defendants correctly note, however, that this interference, alone, is not enough to satisfy the ESA. Rather, plaintiff must also prove by a preponderance of the evidence that this interference will "actually kill[] or injure[]" the owls. 50 C.F.R. § 17.3.

IV. Conclusions of Law

Plaintiff has failed to satisfy its burden of establishing to a reasonable certainty that harvesting the Unit will result in significant habitat modification that would actually kill or injure the owls by significantly impairing the owls' essential behavioral patterns, including breeding, feeding, or sheltering. The telemetry study indicates that this owl pair uses pole young and broad leaf trees for foraging throughout the home range. Although the study indicates that the pair used, and possibly even selected, old forest for foraging, plaintiff has failed to establish that the old forest in the Unit is essential to the owl's survival. The court is not persuaded that removing the Unit as a source of foraging will actually kill or injure the owls.

Unlike in Marbled Murrelet v. Babbitt, 83 F.3d 1060 (9th Cir. 1996), wherein the Ninth Circuit held that harvesting the proposed area "would likely harm marbled murrelets by impairing their breeding and increasing the likelihood of attack by predators on the adult murrelets as well as the young," id. at 1067-68, here, the evidence indicating that the owls also heavily used other old and young timber areas, outside the Unit, for foraging and other activities, and that the owls maintain relatively

high reproductive rates, is persuasive that harvesting the Unit will not harm the owl pair.

V. Conclusion

For the foregoing reasons, plaintiff's motion for permanent injunction [#109] is denied.

IT IS SO ORDERED.

DATED this 10th day of March, 2000.

/s/ Michael R. Hogan
United States District Judge

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Telephone: (503) 378-6313

Attorneys for: Plaintiff

IN THE FEDERAL DISTRICT COURT

FOR THE DISTRICT OF OREGON

STATE OF OREGON, acting by and through the Oregon Department of Forestry,	)	
Plaintiff,	)	Civil No. 93-6223-HO
v.	)	COMPLAINT FOR DECLARATORY RELIEF
INTERNATIONAL PAPER CO., a foreign corporation; FOREST CONSERVATION COUNCIL, a domestic nonprofit corporation; and THE DIRECTOR, UNITED STATES FISH AND WILDLIFE SERVICE, UNITED STATES DEPARTMENT	)	

OF THE INTERIOR,)
)
Defendant.)

I. INTRODUCTION

This is a suit for declaratory relief. Plaintiff seeks a declaration of its legal rights and responsibilities under the Endangered Species Act, 16 U.S.C. § 1531 to 1544. In particular, plaintiff seeks a declaration regarding the respective rights and responsibilities of the parties with respect to a timber sale under state timber sale contract No. 341-90-04, known as Roberts Creek No. 6, located in the Elliott State Forest, Coos County, Oregon.

II. JURISDICTION

This court has jurisdiction pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1346. This action arises under the Endangered Species Act. 16 U.S.C. § 1531 to 1544, and the Declaratory Judgment Act, 28 U.S.C. § 2201.

III. PARTIES

The Oregon Department of Forestry is a duly constituted agency of the State of Oregon, having responsibility for the sale of certain timber on state lands, as well as the general management of timber.

IV.

Defendant International Paper Company is a foreign corporation having its principal place of business in the State of New York.

V.

Defendant Forest Conservation Council is a nonprofit Oregon corporation having its principal place of business in Portland, Oregon, and a branch office in Eugene, Oregon.

VI.

The United States Fish and Wildlife Service is a duly constituted agency of the United States Government and its Department of Interior having responsibility for the enforcement and implementation of the Endangered Species Act. Defendant Director of the United States Fish and Wildlife Service has responsibility for the actions of the employees of the Fish and Wildlife Service in carrying out its responsibilities with regard to the Endangered Species Act.

First Cause of Action

VII.

On or about March 23, 1990, the Oregon Department of Forestry entered into a timber sale contract with International Paper Company, being timber sale contract 341-90-04, and popularly known as the Roberts Creek No. 6 timber sale. The timber sold is located on the Elliott State Forest in Coos County, Oregon. Proceeds from the sale of the timber on this sale are dedicated to the "Common School Fund" and are to support the education of children in public schools from kindergarten through high school. A copy of the timber sale contract is attached hereto as Exhibit 1 and incorporated by reference herein.

VIII.

On or about June 12, 1991, a pair of Northern Spotted Owls was discovered in or near the timber sale area. The Oregon Department of Forestry was formally notified of the existence of this owl pair in September, 1991, and, after

conferring with the Oregon Department of Fish and Wildlife, notified defendant International Paper Company of the presence of this spotted owl pair on November 8, 1991.

IX.

The Northern Spotted Owl was listed as a "threatened" species under the provisions of the Endangered Species Act on July 23, 1990. Thereafter, the United States Fish and Wildlife Service issued guidelines for timber harvesting to avoid an "incidental take" of the Northern Spotted Owl. The term "take" is defined in the Endangered Species Act, 16 U.S.C. § 1532(19). An "incidental take" is a "take" incidental to the conducting of an otherwise lawful activity. Thereafter, in August, 1992, the United States Fish and Wildlife Service rescinded those guidelines. See Exhibit 2, attached hereto and incorporated by reference herein. However, even after the guidelines were rescinded, the United States Fish and Wildlife Service represented to the plaintiff and others that the rescinded guidelines represented the best biological information available to avoid an "incidental take" under the Endangered Species Act, and further informed the plaintiff that enforcement action could be taken against plaintiff and its employees, officers, and agents in the event of activity on state lands which could constitute a "take."

X.

Under the terms of the Endangered Species Act, it is unlawful for any person, including any state, or any officer, employee, agent, department or instrumentality of any state, to "take" any endangered species. It is the policy of the State of Oregon and in particular, of this plaintiff, that the State of Oregon and its agencies will comply with the law, including the Endangered Species Act.

XI.

No owls were discovered in the vicinity of the Roberts Creek No. 6 timber sale in 1992. As yet, no owls have been discovered in that area during 1993.

XII.

The Marbled Murrelet was listed as a "threatened" species under the Endangered Species Act on October 1, 1992. In late 1992, plaintiff was informed of occupied behavior by at least one Marbled Murrelet in the near vicinity of the Roberts Creek No. 6 timber sale. No guidelines have been issued by the United States Fish and Wildlife Service to determine what activity or activities would constitute a "take" of the Marbled Murrelet under the Endangered Species Act, although plaintiff has repeatedly requested guidance from the United States Fish and Wildlife Service.

XIII.

Under the rescinded guidelines issued by the United Fish and Wildlife Service, as well as the protocols issued by the Service for owl surveying, it appears that allowing a harvest of the timber contained in the Roberts Creek No. 6 timber sale would result in a "take" of the Northern Spotted Owl. In addition, plaintiff fears that allowing timber harvest would result in a "take" of one or more members of the Marbled Murrelet species. It is both the policy and the desire of the plaintiff to avoid any unlawful "take" of any threatened or endangered species under the Endangered Species Act. It is the duty of plaintiff to carry out its contracts and to generate revenues from this sale for the Common School Fund.

XIV.

Defendant International Paper Company has given notice to the Oregon Department of Forestry of its intent to file suit for breach of the timber sale contract if it is not allowed to go forward and harvest timber on the Roberts Creek No. 6 timber sale. See Exhibit 3, attached hereto and incorporated by reference herein.

XV.

Defendant Forest Conservation Council has similarly given notice of its intent to sue plaintiff and others if plaintiff allows the timber sale to go forward. See Exhibit 4, attached hereto and incorporated by reference herein.

XVI.

Plaintiff has repeatedly sought the advice and assistance of the United States Fish and Wildlife Service regarding whether allowing a harvest of this timber sale would constitute a "take" of either the Northern Spotted Owl or the Marbled Murrelet. However, plaintiff has received no clear statements with respect to "take" and so remains uncertain of its rights and responsibilities under the Endangered Species Act.

XVII.

In addition to the other provisions of the timber sale contract at issue, defendant International Paper Company has agreed that it "shall at all times observe and comply with all federal and state laws, and lawful regulations issued thereunder and local bylaws, ordinances and regulations, which in any manner affect the activities of [International Paper Company] under this contract." Exhibit 1, at section 21. It is the position of the plaintiff that this provision requires International Paper

Company to comply with the provisions of the Endangered Species Act, and, lawful regulations pursuant to it.

XVIII.

As a result of the notice of intent to sue tendered by defendants International Paper Company and Forest Conservation Council, plaintiff is at risk of receiving inconsistent legal interpretations of its rights and responsibilities. In addition, in the event that plaintiff allows the timber sale to be harvested, plaintiff is subject to civil and criminal penalties at the hands of the United States Fish and Wildlife Service and the United States Government pursuant to the provisions of the Endangered Species Act.

XIX.

A real and substantial controversy exists between the parties hereto. This controversy can be settled only by a common adjudication in one forum. Plaintiff has no adequate remedy at law.

WHEREFORE, plaintiff prays for a declaration of the respective rights, responsibilities, and legal obligations of the parties, individually and among and between themselves, with respect to the Roberts Creek No. 6 timber sale contract No. 341-90-04.

DATED this _____ day of July, 1993.

Respectfully submitted,

THEODORE R. KULONGOSKI
Attorney General

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Assistant Attorney General
DENISE G. FJORDBECK #82257
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Telephone: (503) 378-6313

App. Y-1

United States Department of the Interior

OFFICE OF THE SOLICITOR
Pacific Northwest Region
500 N.E. Multnomah Street, Suite 607
Portland, Oregon 97232

December 10, 1997

Phillip D. Chadsey
Stoel Rives
Standard Insurance Center
900 SW Fifth Avenue, Suite 2300
Portland, Oregon 97204-1268
Fax: (503) 220-2480

RE: Walker Creek northern spotted owl site

Dear Mr. Chadsey:

On December 2, 1997, two representatives of the United States Fish and Wildlife Service ("Service") visited the Walker Creek northern spotted owl site at your client's invitation. The visit confirmed that the site contains nesting habitat as well as foraging or dispersal habitat for spotted owls.

Survey protocols peer reviewed by federal and state agencies, as well as scientists, biologists, and managers of private timber companies, recommend documenting that a site is vacant for three years before it is considered unoccupied. The removal of nesting habitat at the Walker Creek site, and the prey base associated with this high quality habitat, would create a risk of harm to the spotted owls which would use this site. The Service recommends that the site continue to be monitored consistent with the protocols if Boise wants to be sure it is unoccupied.

As indicated to you in previous correspondence, if your client desires certainty in this matter, it is welcome to pursue an HCP and an incidental take permit under the ESA. This office and the Service would be pleased to provide technical assistance in this endeavor. Another option might be to pursue a land exchange with the State of Oregon, which we believe may be the best alternative for all involved parties.

For the Regional Solicitor

/s/ Steven Siegel
Steven Siegel
Attorney
U.S. Department of the Interior

FILED

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DISTRICT OF OREGON
PORTLAND, OREGON
BY /s/ unreadable

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

BOISE CASCADE CORPORATION,	)
	) Civil No. 97-1810-JO
	)
Plaintiff,	) **DECREE AND**
	) **JUDGMENT**
v.	)
	)
MICHAEL J. SPEAR, REGIONAL DIRECTOR FOR U.S. FISH & WILDLIFE SERVICE.	)
	)
Defendant.	)
	)

This matter came on for hearing on defendant's motion for preliminary injunctive relief before the Honorable Robert E. Jones, United States District Judge, to enjoin and restrain plaintiff from logging a tract of timber that it owns in Clatsop County, Oregon, known as the Walker Creek Unit. On April 1, 1998, this Court issued an Opinion and Order granting the preliminary injunction request and staying the case until September 4, 1998, pending surveying. The factual findings and conclusions of law set forth in that order and the attached Factual Findings and Conclusions of Law are incorporated by reference into this decree.

On September 15, 1998, this Court held a status conference to evaluate the results of the surveying. On the basis of all evidence submitted by the parties, and arguments of counsel, this Court hereby finds and concludes that defendant is entitled to a permanent injunction in this matter.

Therefore,

IT IS ORDERED AND ADJUDGED that Boise Cascade Corporation, plaintiff herein, its officers, employees and agents, and all those in active concert with them, are hereby permanently enjoined and restrained from taking any northern spotted owls by the logging of any further timber in its Walker Creek Unit without a permit issued pursuant to Section 10 of the ESA. Plaintiff's counterclaim for injunctive and declaratory relief is dismissed.

Dated Oct 15, 1998

/s/ Robert E. Jones
Honorable Robert E. Jones
U.S. District Judge

SUBMITTED BY:

/s/ Samuel D. Rauch, III
Samuel D. Rauch, III,
Of Attorneys for Defendants

U.S. Department of Justice

Environment and Natural Resources Division

SDR
90-8-6-04291

Wildlife and Marine Resource Section
P.O. Box 7369
Ben Franklin Station
Washington, D.C. 20044-7369

Telephone (202) 305-0210
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July 30, 1999

Phillip D. Chadsey
Stoel Rives LLP
900 SW Fifth Avenue, Suite 2300
Portland, Oregon 97204-1265
Facsimile: 503-220-2480

Re: Boise Cascade Corp. v. Peterson, Civil No. 98-1538-JO (D.Or.); Boise Cascade Corp. v. Spear, Civil No. 97-1810-JO (D.Or.)

Dear Mr. Chadsey

As you are aware, the United States Fish and Wildlife Service ("FWS") has now concluded that, based upon their review of all of the information concerning the Walker Creek site over the last three years and the new survey results, the best scientific information currently available indicates that no spotted owls would be taken by Boise Cascade's planned harvest of the property. Accordingly, the FWS has determined that an incidental take permit under the Endangered Species Act is no longer required.

In light of these determinations, the federal government would support a motion filed either by Boise Cascade or filed

jointly by Boise Cascade and the federal government to lift the present injunction. Please call me if you have any questions.

Sincerely,

/s/ Samuel D. Rauch, III

Samuel D. Rauch, III
Trial Attorney
(202) 305-0220

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No. 00-1238

IN THE

Supreme Court of the United States

BOISE CASCADE CORPORATION,
a Delaware corporation,
Petitioner,

v.

STATE OF OREGON,
Respondent.

On Petition For Writ of Certiorari To The Oregon Court of Appeals

AMICUS CURIAE BRIEF OF AMERICAN FOREST & PAPER ASSOCIATION IN SUPPORT OF THE PETITION

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INTEREST OF *AMICUS CURIAE*

Amicus American Forest & Paper Association ("*amicus*" or "AF&PA") is the national trade association representing the forest products sector of the economy.[1] Our members have profound business interests in the issues in this case. AF&PA supports the position that the Endangered Species Act ("ESA"), concepts of fairness, and the U.S. Constitution all place "upon the public at large, rather than upon fortuitously accountable individual landowners, the cost of preserving the habitat of endangered species." *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 735-36 (1995) (Justice Scalia, dissenting).

Amicus's members own the majority of commercial private timberlands in the United States. Many States regulate timber harvesting on private lands under State Forest Practices Acts. Under these programs, several States have done more than inform the private landowner of his or her duty to avoid ESA § 9 "take" of listed wildlife. They have adopted regulations which idle substantial acreage around the nesting sites (or other suitable habitat) of an ESA-listed species, and thereby prevent economic uses of the timber resource in the resultant State-created wildlife preserve. Our view is that many such broad deprivations of economic property uses are compensable under the Fifth and Fourteenth Amendments.

This case well illustrates *amicus*'s concern over uncompensated land use prohibitions imposed in

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[1] Letters indicating the parties' consent to the filing of this *amicus curiae* brief have been filed with the Clerk of the Court. Pursuant to this Court's Rule 37.6, *amicus* certifies that counsel for a party did not author this brief in whole or in part and that no person other than *amicus* made a monetary contribution to the preparation of this brief.

implementation of the ESA. Boise Cascade Corporation (a member of AF&PA) sought to harvest timber on the 65 acres of timberlands it owned in Clatsop County, Oregon. The State Forester disapproved "Boise's harvesting plan because the plan did not . . .protect[ ] 70 acres of suitable spotted owl habitat encompassing the nesting site" for a pair of threatened northern spotted owls, as required by statute. *Boise Cascade Corp v. State of Oregon*, 991 P.2d 563, 564-65 (Or. Ct. App. 1999), Pet. App. A.

Amicus's members face similar State law requirements to dedicate substantial acreage to what are effectively spotted owl preserves in California and Washington. Our members face other duties to preserve wildlife habitat in many other States. Thus, *amicus*'s members are pervasively affected by the order of the court below.

Amicus wishes to present the position that the recurring and unresolved just compensation issues in this case warrant the Court's grant of certiorari and its reversal of the judgment below.

STATEMENT OF THE CASE

Amicus adopts Petitioner's statement of the case. We provide below some legal context on the Endangered Species Act and on how States regulate beyond the ESA § 9 "take" prohibition under State Forest Practices Acts.

1. The ESA protects members of a species which has been listed, under ESA § 4 (16 U.S.C. 1533), as an "endangered species" or "threatened species." The U.S. Fish and Wildlife Service ("FWS") listed the northern spotted owl (which is one of several *subspecies* of *Strix occidentalis*) as a threatened species in 1990. *See* 55 Fed. Reg. 26194 (June 26, 1990). The range of the northern spotted owl ("spotted

owl" or "owl") extends from California, through Oregon and Washington, and into Canada. *See id.*; 50 C.F.R. 17.11.

2. ESA § 9(a) makes it "unlawful for any person subject to the jurisdiction of the United States" to "take any [endangered] species [of fish or wildlife] within the United States." 16 U.S.C. 1538(a)(1)(B). FWS has extended the "take" prohibition to less-imperiled *threatened* species of fish and wildlife (such as the spotted owl), pursuant to discretionary authority delegated by ESA § 4(d), 16 U.S.C. 1533(d). *See* 50 C.F.R. 17.21(c), 17.31(a). Because § 1538(a)(1)(G) makes it unlawful to violate an ESA regulation, essentially the same prohibitions on "take" apply to all endangered and most threatened species of fish and wildlife ("listed wildlife").

3. The ESA defines "take" in terms of active conduct which injures listed wildlife, not failure to preserve habitat benefits. "Take" means to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect" listed wildlife or "to attempt to engage in any such conduct." 16 U.S.C. 1532(19). FWS has defined "harm" to include a habitat modification action (e.g., cutting trees), *if* that action "actually kills or injures wildlife."

> **Harm** in the definition of "take" in the Act means an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.

50 C.F.R. 17.3. This Court upheld the facial validity of the "harm" rule based on the interpretation (and upon representations from the Solicitor General) that the rule "emphasizes that actual death or injury for a protected

animal is necessary for a violation." *Babbitt v. Sweet Home*, 515 U.S. at 691 n.2; *see id.* at 697-703; *see also id.* at 708-09.

4. States have no ESA enforcement responsibilities. Instead, ESA § 11, 16 U.S.C. 1540, grants authority to prevent private actors from "taking" listed wildlife to FWS, to the Department of Justice, and to private citizens (through the citizen suit provision in ESA § 11(g)). ESA § 6 provides for voluntary state participation in implementing the ESA under a traditional "carrot-and-stick" incentive of federal funding if the state decides to assist in implementing the ESA. 16 U.S.C. 1535(c) and (d).[2]

5. Oregon, like several other States, has adopted a State Forest Practices Act to regulate commercial timber harvesting on private and State lands. OR. REV. STAT. §§ 527.610 *et seq.* (1999). Though the terms of the Forest

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[2] Accordingly, the view of a few lower courts that "take" avoidance requires States to structure their regulatory programs to avoid "take" (e.g., *Strahan v. Coxe*, 127 F.3d 155 (1st Cir. 1997), *cert. denied sub nom. Coates v. Strahan*, 525 U.S. 978 (1998)) is difficult to reconcile with ESA § 6's concept that a State can decline to enforce the ESA. Instead, a state permit which is "less restrictive" than the federal "take" prohibition seems to be legally ineffective under ESA § 6(f), 16 U.S.C. 1535(f), without dragooning the State into implementing federal law. The ESA "neither compels nor precludes local regulation; it preempts that which is in conflict." *Loggerhead Turtle v. County Council of Volusia County, Florida*, 92 F. Supp. 2d 1296, 1303, 1307 (M.D. Fla. 2000). Ultimately, the ESA cannot be read as compelling States to use their regulatory programs to enforce the ESA's "take" prohibition because the Tenth Amendment ensures that the "Federal Government may not compel the States to enact or administer a federal regulatory program." *Printz v. United States*, 521 U.S. 898, 933 (1997). Thus, Oregon's rules on preserving a fixed amount of suitable owl habitat appear to be the voluntary act of a sovereign State.

Practices Acts vary State by State, the Acts usually grant authority to the State forester to adopt regulations requiring the use of certain timber harvesting practices and providing levels of State-desired environmental protection. *See* OR. REV. STAT. §§ 527.670, 527.714-.770 (1999).

Pursuant to its Forest Practices Act, the Oregon Forestry Department adopted rules prohibiting timber harvesting on the 70 acres around each owl nesting site that provide the most suitable habitat for a pair of spotted owls. "A 70 acre area of suitable owl habitat encompassing the nest site, [must] be maintained as suitable owl habitat." OR. ADMIN. R. 629-665-0210 (2000), Pet App. J; *see Boise Cascade*, 991 P.2d at 564 n.1, Pet. App. A (quoting the functionally identical former OR. ADMIN. R. 629-24-809 in effect when Petitioner sought the State's approval).

6. *Amicus*'s members are also subject to analogous owl habitat rules under Forest Practices Acts of California and Washington. As in Oregon, those rules require that substantial acreage of economically valuable mature timber be preserved as suitable owl habitat. In California, timber harvesting is generally prohibited where it would not retain "500 acres of owl habitat . . . within a .7 mile radius of the active nest site or pair activity center" and "1336 total acres of owl habitat must be provided [within] 1.3 miles of each nest site or pair activity center." CAL. CODE REGS. Tit. 14, 919.9 and 939.9 (1999). In Washington, through 1996 timber harvesting was prohibited in the "most suitable 500 acres . . . surrounding a spotted owl site center." WASH. ADMIN. CODE 222-16-080(h) (2000). While, under the current rules, the acreage where timber harvesting is precluded varies according to the area involved, substantial acreage remains off-limits to economic use of the renewable timber resource. *See id.*

7. The spotted owl habitat rules in Oregon, California, and Washington impose huge economic costs on those landowners unlucky enough to have that listed species on their lands. In Boise Cascade's case, a jury found that, during the 4½ years when timber harvesting was prohibited (before the owls left the area), the value of Petitioner's timber decreased by $1,820,059. Pet. App. T.

Another economic quantification of the cost of providing owl preserves on private lands is provided in Albert Gidari, *The Endangered Species Act: Impact of Section 9 on Private Landowners*, 24 ENVTL. L. 419 (1994). "At today's market value, timber prices can range from $10,000-$40,000 per acre, depending on the wood species." 24 ENVTL. L. at 427). Thus, unless just compensation is available under the Fifth and Fourteenth Amendments, the cost to the landowner of providing an owl preserve of 500 acres of mature timber for a *single* pair of spotted owls can run from $5 to 20 million.

8. Finally, two other ESA provisions have relevance to the issues in this case. First, the 1973 Congress which enacted the ESA adopted a compensatory land acquisition program as the only ESA "program to conserve fish, wildlife, and plants" (i.e., habitat) on private lands. ESA § 5, 16 U.S.C. 1534; *compare* §§ 1531(c)(1), 1533(f), 1536(a)(1) (duties to conserve applicable to federal agencies and federal lands). Congress authorized the acquisition of land "interests" such as conservation or non-development easements/servitudes. 16 U.S.C. 1534.

Second, the 1982 Congress, concerned with the constraints being imposed on productive land uses under interpretations of ESA § 9 "take," adopted two provisions for authorizing the unintentional or "incidental take" of listed wildlife. Where there is some federal action which would

not jeopardize the existence of a listed species, ESA § 7(b)(4) and (o)(2) direct FWS to issue what is known as an incidental take statement. 16 U.S.C. 1536(b)(4) and (o)(2). Where there was no federal action, ESA § 10(a) creates a roughly comparable process whereby a non-federal entity can apply for and possibly obtain a permit allowing incidental take of listed wildlife. 16 U.S.C. 1539(a). A landowner who decides to invoke the ESA § 10(a) permit process must prepare (and agree to commit some lands and dedicate funding to) a habitat conservation plan. *See* 16 U.S.C. 1539(a)(2); 50 C.F.R. 17.32(b); Robert D. Thornton, *Searching for Consensus and Predictability: Habitat Conservation Planning under the Endangered Species Act of 1973*, 21 ENVTL. L. 605 (1991).

Pursuing an ESA § 10(a) permit "is not mandatory." *Defenders of Wildlife v. Bernal*, 204 F.3d 920, 928 (9th Cir. 2000). Further, where there is only a speculative possibility that a land use activity would cause "take," a private "party may proceed without a permit," *id.*, and the activity should not be enjoined. *American Bald Eagle v. Bhatti*, 9 F.3d 163, 165-67 (1st Cir. 1993). In a risk-of-take situation, the landowner has the discretion to make a difficult decision on how to proceed, but "risks civil and criminal penalties if a 'take' occurs." 204 F.3d at 927; *see* Steven P. Quarles et al., *Sweet Home and the Narrowing of "Take" Under Section 9 of the Endangered Species Act*, 26 ENVTL. L. REP. (ENVTL. L. INST.) 10003, 10007-09 (Jan. 1996).

REASONS FOR GRANTING THE WRIT

1. The writ should be granted so that this Court can provide supervisory guidance on recurring issues of great public significance which directly implicate constitutionally-protected property rights. "[T]he Takings Clause ..., as much a part of the Bill of Rights as the First Amendment or Fourth

Amendment, should [not] be relegated to the status of a poor relation," in the constitutional scheme. *Dolan v. City of Tigard*, 512 U.S. 374, 393 (1994). This Court's guidance is critical to ensure that "[t]he right to enjoy property without unlawful deprivation," which "is in truth a 'personal' right," does not go unprotected. *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552 (1972).

Broadly stated, the issue could be phrased as follows: Does a duty under State law to preserve considerable private acreage as suitable habitat for a wildlife species require payment of just compensation under the Fifth and Fourteenth Amendments?

This issue has great economic significance to owners of private property. Many owners of timberlands feel that, if their property is pressed into public service as a *de facto* wildlife refuge, the public should pay the costs of providing and maintaining those wildlife habitat benefits. Allocating to the public the costs of providing the general benefit of species protection serves one of the principal purposes of the Takings Clause, "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

The issue also is very important to local, state and federal officials. Government officials need guidance regarding when requirements to preserve wildlife habitat require compensation, so they can adjust their regulatory programs and land acquisition programs accordingly.

Finally, the question of who should pay the costs associated with foregoing economic property uses to maintain wildlife habitat is one of general public interest and importance. The significance of this question is illustrated

by the extensive legal commentary on when ESA-related land use constraints require compensation under the Fifth and Fourteenth Amendments.[3]

These academic writings provide legal and policy perspectives on the questions implicated by the Petition: (1) Is a duty to maintain listed species on private property a physical occupation taking that is *per se* compensable under *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S.

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[3] The ample literature since 1995 includes James Rosen, *Private Property and the Endangered Species Act: Has the Doctrine of Ripeness Stymied Legitimate Takings Claims?*, 6 HASTINGS W.-N.W. J. ENVTL. L. & POL'Y 31 (1999); Comment, *Denial of Permission to "Take" an Endangered Species Will Amount to a "Taking" Under the Fifth Amendment in Limited Situations*, 21 U. ARK. LITTLE ROCK L. REV. 519 (1999); Blaine Green, *The Endangered Species Act and Fifth Amendment Takings: Constitutional Limits of Species Protection*, YALE J. ON REG. 329 (1998); Srinath Govindan, *"Taking" Steps to Protect Private Property and Endangered Species: Constitutional Implications of Habitat Conservation Planning After* Dolan v. Tigard, 47 EMORY L. J. 311 (1998); Barton Thompson, Jr., *The Endangered Species Act: A Case Study in Takings & Incentives*, 49 STAN. L. REV. 305 (1997); Mark Sagoff, *Muddle or Muddle Through? Takings Jurisprudence Meets the Endangered Species Act*, 38 WM. & MARY L. REV. 825 (1997); Murray Feldman & Michael Brennan, *Judicial Application of the Endangered Species Act and the Implications for Takings of Protected Species and Private Property*, 26 ENVTL. L. REP. (ENVTL. L. INST.) 10646 (Dec. 1996); Kimberly Rockwell, *The Fifth Amendment Implications of Including Habitat Modification in the Definition of Harm to Endangered Species (Babbitt v. Sweet Home Chapter of Communities for a Great Oregon)*, 11 J. LAND USE & ENVTL. L. 573 (1996); Robin Rivett, *Why There Are so Few Takings Cases Under the Endangered Species Act, or, Some Major Obstacles to Takings Liabilities*, SB14 ALI-ABA 507 (1996); Patrick Parenteau, *Who's Taking What? Property Rights, Endangered Species, and the Constitution*, 6 FORDHAM ENVTL. L.J. 619 (1995); and Albert Gidari, *The Economy of Nature, Private Property, and the Endangered Species Act*, 6 FORDHAM ENVTL. L.J. 661 (1995)

419 (1982)?; (2) Does a duty to maintain suitable habitat for some species amount to a servitude or conservation easement which, if it denies almost all economic uses of property, is a taking under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992)?; and (3) is a *Lucas* taking claim ripe only after the landowner has sought an incidental take permit under ESA § 10(a)? Since the questions for review have been amply ventilated in the academic literature, those questions are well positioned for review at this time.

2. The facts of this case present a strong claim for just compensation. For over 4½ years, Oregon's regulations and denial of the State approvals needed to harvest timber required Petitioner to "maintain[ ] as suitable owl habitat" a "70 acre area" around a nest site for a pair of spotted owls. OR. ADMIN. R. 629-665-0210 (2000). Petitioner was prevented from making economic use of its lands by timber harvesting on all but a few of the 65 acres it owned. A jury found that, during the 4½ years when timber harvesting was prohibited (before the spotted owls left the area), the value of the timber decreased by $1,820,059.

a. Petitioner's first theory for compensation is that Oregon has mandated a physical occupation of private lands by a listed wildlife species and has prohibited Petitioner from excluding an unwanted tenant (the spotted owls) from its lands. This Court has not squarely addressed whether a duty to maintain wildlife or wildlife habitat is a physical occupation calling for compensation under the *per se* takings rule of *Loretto* and its progeny.

Since Petitioner was denied the right to "exclude a stranger's [spotted owls' continued] physical occupation" of its property, the decision below is in tension with this Court's rulings on physical occupation takings. *Loretto*, 458 U.S. at 439 n.17; *see Dolan*, 512 U.S. at 393 (emphasizing

the "the right to exclude" is central to property rights); *Yee v. City of Escondido*, 503 U.S. 519, 528 (1992) (a "different case would be presented" if a statute or regulation compelled a "landowner over objection to rent his property or to refrain from terminating a tenancy"). Under this Court's precedents, the key factor is whether the government has authorized the continued physical occupation, not whether the government had control over the occupant. *Loretto*, 458 U.S. at 432-33 n.9. Thus, the physical occupation theory warrants review by this Court because the decision below is in apparent conflict with this Court's precedents. *See* Pet. at 12-13, 20-22. Further, since the habitat maintenance requirement may often induce other listed species to use that habitat, Oregon's rules invite physical occupation by more listed species against a landowner's wishes.

Respondents will no doubt continue to argue that duties to maintain wildlife habitat and to not exclude already-present listed species are not *per se* physical occupation takings. Respondents prevailed on that argument in the court below. *See* 991 P.2d at 569-70, Pet. App. A. Moreover, Respondents' argument has been accepted in most of the relevant lower court rulings.[4]

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[4] *See Southview Associates, Ltd. v. Bongartz*, 980 F.2d 84 (2d Cir. 1992) (required habitat for deer); *Mountain States Legal Foundation v. Hodel*, 799 F.2d 1423 (10th Cir. 1986) (en banc) (damage caused by protected wild horses and burros); *Kigli v. City of Santa Cruz*, 620 F. Supp. 609 (N.D. Cal. 1985) (maintaining a greenbelt); *Florida Game & Fresh Water Fish Comm'n v. Flotilla, Inc*, 636 So.2d 761 (2d Dist. Fla. 1994) (habitat for eagle nests); *Moerman v. State of California*, 21 Cal. Reptr. 2d 329 (1st Dist. 1993) (damage caused by elk); *Seven Islands Land Co. v. Maine Land Use Regulation Comm'n*, 450 A.2d 475 (Maine 1982) (required habitat for deer).

But, as the number of lower court opinions attests, courts continue to struggle with this frequently recurring issue. This is an appropriate case for the Court to provide definitive guidance on whether a physical occupation taking occurs when the government mandates the continued presence of wildlife on private lands.

b. The Petition fairly encompasses the related theory that the Oregon rule on maintaining 70 acres of suitable owl habitat creates a servitude that denies all beneficial use of private lands, and that is compensable under *Lucas*. *See* Pet. at 12-13, 21. This theory has a strong basis in this Court's precedents.

Where a State requires "land to be left substantially in its natural state" there is a "practical equivalence . . . of negative regulations [prohibiting development] and appropriation" of a "servitude[ ]" through condemnation of a non-development easement. *Lucas*, 505 U.S. at 1018-19. In either case, the Constitution demands compensation. The "benefits flowing to the public from preservation of open space through regulation [as Oregon has done here] may be equally great as from creating a *wildlife refuge* through formal condemnation" of conservation easements or servitudes. *Id.* at 1018 (emphasis added and internal quotations omitted).

Petitioner's duty under the Oregon regulation to maintain suitable owl habitat might be analogized to the duties in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), to keep an historic property in good repair and to not undertake activities that would alter the status quo. To at least three members of the *Penn Central* Court, the duty to "strictly adhere to their past use" of private property was in effect a government acquisition of a

"servitude" for which just compensation was owed. 438 U.S. at 146 (dissenting opinion of Chief Justice Rehnquist).

Thus, review is amply warranted on the important issue of whether just compensation is owed where a government regulation effectively creates a non-development servitude that preserves wildlife habitat on, and prohibits virtually all economic uses of, private property.

3. The appellate court denied Boise Cascade the compensation a jury had awarded. It did so by ruling that Petitioner's claim of a compensable taking would not be ripe for judicial review until Petitioner first sought an ESA § 10(a) permit, not from Oregon, but from FWS. *See* 991 P.2d at 571-74, Pet. App. A. Whether applying for an ESA § 10(a) permit is required for a ripe takings claim is a recurring issue in case law and the legal literature. The Court should grant the writ to provide guidance on this issue.

Bringing clarity to the unresolved ripeness issue is a particularly important role for this Court. Without this Court's guidance, the uncertainty over ripeness may keep a litigant from having his day in court and allow potentially unconstitutional action to go unchecked simply because "the conscientious jurist might tend to dismiss any close call" on ripeness. Gene R. Nichol, Jr., *Ripeness and the Constitution*, 54 U. CHI. L. REV. 153, 183 (1987).

Review is further warranted because the ruling below on ripeness is erroneous and pernicious. It would be contrary to the fairness principles which underlie Fifth Amendment jurisprudence to conclude that, where a State agency is the alleged "taker" of property and the State agency has no internal variance procedure, the landowner must seek a variance from a *federal* agency which, if granted, the State agency might or might not find satisfactory under State law.

See MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 350 n.7 (1986).[5] Making the constitutional right of just compensation contingent on seeking a "variance" from someone other than the alleged "taker" is at least in tension with *Williamson Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 193 (1985).

Unless this Court corrects the erroneous judgment below, the political branches could create a lengthy maze of Kafkaesque proportions which would be destructive of private property rights.[6] The ability for a State to create a

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[5] Some of the law review commentaries cited above have opined that, where FWS itself has imposed the property use restriction by its "harm" rule, the landowner should be required to seek an ESA § 10(a) permit from FWS before a ripe just compensation claim exists. But the relevant considerations are far different where a State has elected to regulate beyond simply advising private parties of their ESA § 9 duty to avoid "take" (a function already served by OR. ADMIN. R. 629-665-0210(4)) and where it is the State's broader habitat protection action that allegedly requires just compensation.

[6] Under the ruling below, no constitutional claim for just compensation redress is available until: (1) the property owner has applied to the State to make economic use of land and the state has denied those applications; (2) the landowner applies to FWS for an ESA § 10(a) permit, and the landowner bears the considerable costs, time delays, and uncertainty associated with such permits (including the costs of committing to a habitat conservation plan); (3) FWS decides whether the plan may be approved or whether adjustments to the landowner's proposal are desired under FWS's substantial discretion in granting or withholding ESA § 10(a) permits; (4) the landowner decides whether to make the adjustments; (5) FWS decides to issue the ESA § 10(a) permit; and (6) the State decides whether any FWS-granted ESA § 10(a) permit meets the objectives of State law (a decision presumably already made in the permit denial decision and in the absence of a variance procedure under State law). After exhausting those purported ripeness prerequisites, the landowner can often look forward to the seven years of litigation on the just compensation claim which Petitioner has endured (including

(continued....)

"cumulative" permitting regime "is rife with the possibilities of mischief" precisely because enlisting both State and federal procedures could "easily consume resources that exceed the commercial value of the undertaking subject to the permit power," and would perpetuate a "permit waltz" that excludes landowners from court by requiring them to dance through multiple layers of a permitting process. Richard A. Epstein, *The Permit Power Meets the Constitution*, 81 IOWA L. REV. 407, 413 (1995).

The Petition (at 14-20) provides powerful reasons why, legally and factually, the ESA § 10(a) process is not a required "variance" procedure under the *Williamson* line of cases. We would add that, since the ESA § 10(a) process is "not mandatory" (*Bernal*, 204 F.3d at 927), it should not be transformed into a mandatory prerequisite to the constitutional right of just compensation. Further, since the price for any incidental take permit issued by FWS includes the landowner's commitment of lands and funds to a habitat conservation plan, it is at most a "variance with an exaction" which presents additional constitutional concerns. *See Dolan*, 512 U.S. at 385.[7]

(continued) . . .

two trips up and down the State court system) thus far in this case. If the lower court's view is accepted, many landowners will decide they cannot afford to run this gauntlet. Property rights will be diminished without an effective avenue for redress.

[7] Since an ESA § 10(a) permit must include a habitat conservation plan and conditions which "minimize and mitigate" take (16 U.S.C. 1539(a)(2)(B)), this suggests that any such permit would require preservation of virtually the same 70 acres around the nest site. Further, OR. ADMIN. R. 629-665-0210(1) (the provision requiring preservation of 70 acres around each spotted owl nest site) was not adopted merely to prevent "take," since that function is already

(continued....)

4. The "majority of endangered species" occur predominately or partially on private lands. Michael J. Bean, *The Endangered Species Act and Private Land: Lessons Learned From the Past Quarter Century*, 28 ENVTL. L. REP. (ENVTL. L. INST.) 10701 (Dec. 1998). The Court should accept review and reverse in order to create the market incentives necessary to provide long-term protection for those listed species which depend on private lands.

Legal rules which force a few landowners to bear the sometimes high costs of maintaining listed species create economic incentives that are contrary the interests of listed species. For example, those rules encourage landowners to cut timber before it ever becomes suitable habitat for listed species commonly associated with old-growth forests. *See* 28 ENVTL. L. REP. at 10706. The ESA's lofty goals have a better chance of success if just compensation rules exist which make it in a private landowner's interests to grow or maintain suitable habitat for such species.

Owners of mature timberlands are among the least culpable for the current condition of listed species like the spotted owl. Their lands continue to provide the habitat

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(continued) . . .

accomplished by § 629-665-0210(4). ("Federal law prohibits a person from taking northern spotted owls" and "[c]ompliance with subsection (1) of this rule is not in lieu of compliance with any federal requirements related to the federal Endangered Species Act"). Hence, on the face of the rule, even if FWS grants an incidental take permit, Oregon is likely to continue to require preservation of the same 70 acres that § 629-665-0210(1) directs. This not only suggests that the alleged variance process is futile, but that there is no rational basis under *Nollan-Dolan* to require exhaustion of an incidental take permit process where § 629-665-0210(1) is not expressly designed simply to prevent "take."

needed by the species. The past actions of others in removing forests to create cities, farms, and other land improvements have reduced suitable habitat to the point that ESA listing occurred. Since those past actions have inured to the general public benefit, and since the preservation of habitat for listed species has been determined to be in the public interest, it is fair to have the public pay the costs of providing these habitat benefits.

5. The ESA itself supports landowner compensation when the public desires greater protection of wildlife habitat than occurs under the "take" prohibition. Private landowners are "understandably unwilling" to forego the "clearing of fields and forests for development or resource extraction" in order to provide suitable habitat for listed species, because that forces on a few unfortunate landowners the "excessive costs" of providing habitat benefits desired by the public. 119 Cong. Rec. 30,162 (Sept. 18, 1973) (statement of Rep. Sullivan, the ESA House floor manager).

During the ESA debates, the House and Senate leadership repeatedly distinguished between: (1) the "take" of listed wildlife, which the government ordinarily could prevent by regulation, without providing compensation; and (2) providing additional protections for listed species and their habitats, which the government could only achieve by voluntary cooperation with willing landowners or by providing compensation for the acquisition of non-development easements. 119 Cong. Rec. 30,162 (remarks of Rep. Sullivan); 119 Cong. Rec. 25,669 and 25,691 (July 24, 1973) (remarks of Sen. Tunney and Sen. Nelson). As the Senate Report summarizes, the "two major causes of extinction are hunting and destruction of natural habitat" – the ESA primarily addresses that latter cause by "increas[ing] the amounts authorized to be appropriated to

acquire lands for the purpose of conserving, [or] protecting . . . endangered species." S. Rep. No. 93-307, at 2-3 (1973), 1973 U.S.C.C.A.N. 2989, 2990-91. This explains why the 1973 Congress adopted a compensatory "land acquisition" program as the only "program to conserve fish, wildlife, and plants" located on private lands. ESA § 5, 16 U.S.C. 1534. Here, where Oregon effectively acquired a non-development servitude to create an owl preserve, the ESA supports compensation of Petitioner.

6. In *Sweet Home*, this Court recognized the legitimate role of compensatory land acquisition under ESA § 5 or other law (here, the Fifth and Fourteenth Amendments) where the public desires habitat protection beyond, or in the absence of, a proven ESA § 9 "take" of listed wildlife. 515 U.S. at 702-03. The ESA § 9 prohibition against "taking" listed wildlife does not authorize regulations which replicate the "broad, affirmative duty to avoid adverse habitat modifications" that is imposed with respect to federal lands by ESA § 7, 16 U.S.C. 1536; ESA § 9 is limited to "habitat modification that 'actually kills or injures wildlife.'" *Id.* Thus, the *Sweet Home* majority opinion supports land acquisition with compensation, not uncompensated deprivation of property uses, where a State directs maintenance of wildlife habitat values, in lieu of simply informing private actors of their ESA § 9 duty to avoid the "take" of listed wildlife.[8]

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[8] Oregon's requirement that a "70-acre area" around each spotted owl nest site "be maintained as suitable owl habitat" goes beyond any proven ESA § 9 "take" of owls, and into the domain of providing habitat benefits. No one can state with certainty that retaining less than 70 acres of mature forest habitat will proximately cause the death ("take") of a spotted owl. *See United States v. West Coast Forest Resources Limited Partnership*, No. 96-1575-HO, 2000 WL

(continued....)

The dissenting justices in *Sweet Home* (Chief Justice Rehnquist, and Justices Scalia and Thomas) read ESA § 5 and the legislative intent as requiring compensation in even more circumstances:

> [H]abitat destruction on private lands is to be remedied by public acquisition, and *not* by making particular unlucky landowners incur "excessive cost to themselves." . . . [T]he land acquisition program [i]s the Act's only response to habitat modification *by private landowners* . . . . The Endangered Species Act is a carefully considered piece of legislation that forbids all persons to hunt or harm endangered animals, but places upon the public at large, rather than upon fortuitously accountable individual landowners, the cost of preserving the habitat of endangered species.

515 U.S. at 728-29, 735-36. Under this well-founded view, the public at large (here, Oregon), not the unfortunate landowner, should pay the costs of maintaining suitable owl habitat on private lands.

CONCLUSION

The writ of certiorari should be granted.

(continued) . . .

298707 (D. Or. decided March 13, 2000) (FWS did not prove "take" though timber harvesting would not comply with FWS's guidance on minimum needs for suitable owl habitat). Oregon's 70-acre rule is either a: (1) bright line rule which goes beyond what would cause "take" in every circumstance, and which was adopted as an administratively convenient way to prevent small risks of "take"; or (2) a general habitat preservation rule. Even under assumption (1), in venturing beyond simply prohibiting "take" and in creating a non-development servitude on 70 acres, Oregon has exposed itself to just compensation liability.

Respectfully submitted,

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No. 00-1238

In the

Supreme Court of the United States

BOISE CASCADE CORPORATION,
a Delaware corporation,

Petitioner,

v.

STATE OF OREGON,

Respondent.

On Petition for Writ of Certiorari to the Oregon Court of Appeals

BRIEF AMICI CURIAE OF PACIFIC LEGAL FOUNDATION, OREGON FARM BUREAU FEDERATION, AND CALIFORNIA FARM BUREAU FEDERATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Where the government requires a property owner to submit to the physical occupation of its land, may the government evade liability for a physical taking merely because it did not "cause or induce" the occupation?

2. Where a regulatory takings claim is based on a state agency's self-described "Final Order" denying an application for a timber harvesting permit, is that claim rendered "unripe" merely because the applicant did not seek an entirely different kind of permit from a *separate federal agency* that lacked any authority to approve the harvesting under state law?

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Supreme Court Rule 37 1

INTEREST OF AMICI CURIAE

For more than 25 years, amicus Pacific Legal Foundation (PLF) has been litigating in support of the rights of individuals to make reasonable use of their private property. PLF attorneys have been before this Court on two occasions representing individuals whose right to use their property was unlawfully denied by government agencies. *See Suitum v. Tahoe Regional Planning Agency*, 502 U.S. 725 (1997); *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). PLF attorneys will soon appear before this Court yet again on behalf of a property owner who, like petitioner here, is asserting a regulatory takings claim against a state government. *See Palazzolo v. Rhode Island*, No. 99-2047 (argument scheduled for Feb. 26, 2001). Finally, PLF has participated as amicus curiae in nearly every major real property takings case heard by this Court in the past two decades.[1]

Oregon Farm Bureau Federation (OFBF) has represented the interests of farmers, ranchers, and small timber owners for the past 77 years as the largest general agricultural organization in that state. With more than 20,000 members, OFBF represents one of the largest blocks of private landowners in Oregon. Because of the climate and geography that prevail there, many farms and ranches contain forestland. Thus, many of Oregon's agricultural producers are primarily forest managers. As such, they are directly affected by restrictions on access to privately owned resources like the restrictions imposed here by the state Board of Forestry. The impact of such restrictions is especially

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, amici curiae affirm that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

dramatic on small landowners. A judicial decision concerning whether and in what circumstances the public must compensate private property owners who are restricted in their use and possession of resources will have a direct effect on the members of OFBF.

California Farm Bureau Federation (CFBF) is a voluntary membership, nonprofit private association that serves farmers, ranchers, and other producers of agricultural commodities. Its more than 45,000 voting member families make up 80% of the commercial agricultural producers in the State of California. They are joined by almost 30,000 non-voting members who represent rural communities and who support the principles and philosophy of this agricultural organization. A large number of CFBF's producer families are owners of non-industrial timberlands. These timberlands are typically managed as an integral part of a farm or ranch, and they often produce some combination of livestock, vineyards, orchards, and grain as well as a limited amount of timber itself. These privately owned, non-industrial timberlands consist almost exclusively of planted regrowth, which provides not only essential economic support for the overall agricultural operation but also important blocks of habitat for wildlife coexisting with carefully planned harvest operations. None of these economic and ecological benefits would exist apart from the investment, industriousness, and stewardship of private landowners.

The ability to enter and harvest timber resources in response to farm or ranch economics and market opportunities is essential to the viability of these family agricultural enterprises. Unpredictable interference with harvests for the purpose of setting aside wildlife habitat may deprive these families of critical assets at a time when they may be badly needed to offset unexpected costs or crop losses. Furthermore, such delays can even result in a total loss of the timber. There is great risk inherent in holding a long-maturing asset that may be destroyed at any time by fire—a loss that is economically uninsurable for

non-industrial operations. Forcing families to forego harvesting their timber so that it can serve as a set-aside for habitat, therefore, not only deprives them of current income that may be critical to economic viability, it also forces them to bear the uncompensated risk that they will lose their total investment. Whether the state has the power—without the payment of any compensation—to place these burdens on private landowners for the purpose of aiding admittedly public wildlife resources is a question of vital importance to CFBF members.

SUMMARY OF ARGUMENT

The jury unanimously found that petitioner Boise Cascade Corp. (Boise) was "required to submit to the physical occupation of its property" by spotted owls as a result of the Oregon Board of Forestry's timber-harvesting regulations. Without so much as questioning this finding, the court below ruled that the state could not be liable for a compensable taking by permanent physical occupation if the state did not "cause or induce" the occupation. In so ruling, the lower court decided an important question of federal takings law in a way that conflicts with this Court's takings jurisprudence and with the decisions of other lower courts.

First, this Court's decisions make clear that the government effects a physical taking whenever it requires a property owner to submit to the physical occupation of his land or (to say the same thing) whenever it deprives the owner of the right to exclude strangers. Under either formulation, it is *required acquiesence* that is the touchstone of a compensable physical occupation. This Court's decisions further make clear that the government cannot evade takings liability merely because the instrument of the required occupation was not the government itself but rather a third party. In none of these decisions did the Court make the government's "causing or inducing" the third-party occupation a prerequisite to liability. Indeed, in each of

the cases, the government merely "permitted" the occupation, which resulted from the independent choice of a third party.

Second, lower courts have applied this Court's physical takings jurisprudence in a manner that conflicts with the decision below. These courts have found that physical takings are (or would be) effected by two federal regulatory schemes that require property owners to acquiesence in physical occupations by their competitors. Under neither of these schemes could the government be said to "cause or induce" the occupations, and no court made such causing or inducing a prerequisite to finding a taking. Moreover, the courts rejected the argument that a required acquiesence in a physical occupation could be justified as a "permissible regulation of the *use* of real property."

ARGUMENT

IN RULING THAT A STATE CANNOT BE LIABLE FOR A PERMANENT PHYSICAL OCCUPATION IF IT DOES NOT "CAUSE OR INDUCE" THE OCCUPATION, THE COURT BELOW DEPARTED FROM THIS COURT'S DECISIONS AND EXACERBATED A CONFLICT AMONG THE LOWER COURTS

In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992), this Court identified "at least two discrete categories of regulatory action as compensable without case-specific inquiry into the public interest advanced in support of the restraint." The first instance of what are called "categorical" takings "encompasses regulations that compel the property owner to suffer a physical 'invasion' of his property." *Id.* As to such physical invasions—also called physical "occupations"—the law is that "no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation." *Id.* As explained below, Boise suffered this kind of categorical taking when the State forced Boise to submit to the physical occupation of its land by spotted owls. In holding otherwise, the court below necessarily rejected this

Court's physical takings jurisprudence and exacerbated a split in the lower courts on an important question of takings law.

A. The Issue and the Lower Court's Ruling

In its most recent consideration of categorical takings by physical occupation, this Court explained that the government effects a physical taking whenever "it requires the landowner to submit to the physical occupation of his land." *Yee v. City of Escondido*, 503 U.S. 519, 527 (1992). To rephrase the point, a physical taking occurs whenever the government deprives a property owner of his "right to exclude," a right that is "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Id.* at 528 (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979)). In either formulation, it is the "element of *required acquiescence* [that] is at the heart of the concept of occupation." *Id.* at 527 (quoting *FCC v. Florida Power Corp.*, 480 U.S. 245, 252 (1987)).

In the present case, Boise Cascade alleged in its inverse condemnation complaint that the Oregon Board of Forestry's regulations were intended to *require* every timberland owner to maintain any property containing spotted owl nests in such a manner that the property could "be *occupied* annually by a pair of adult spotted owls who are capable of breeding." Second Supplemental Complaint ¶ 13 (filed Nov. 20, 1997) (emphasis added). Boise further alleged that the Board "requir[ed]" the company to maintain its timberland in such a manner that the land "could be *occupied* as a spotted owl nesting site from January 15, 1993 to October 17, 1997." *Id.* ¶ 14 (emphasis added). In brief, Boise alleged that the Board intended to, and in fact did, require it to submit to the physical occupation of its land by spotted owls. Or, to frame the allegation in other pertinent terms, the Board deprived Boise of its right to exclude the owls from its property and instead required Boise to acquiesce in the owls' presence on its land. The jury credited this allegation, finding that Boise was indeed "required to submit to a physical

occupation of its property as a result of the Board of Forestry's order"—an order that left Boise "unable to log" its timber. 1 Petition Appendix (Pet. App.) at E–1 to –2. Given these allegations and findings, Boise successfully stated a claim for, and proved, a categorical taking by physical occupation under this Court's precedents.

Without in any manner questioning the jury's unanimous finding, the court below nonetheless rejected Boise's physical occupation claim. The court reasoned as follows: "The state did not cause or induce the spotted owls to breed on [Boise's] property. The state simply regulated [Boise's] use of the property based on the presence of the spotted owls there." 1 Pet. App. at A–15. As set forth below, this reasoning is flawed: the decisions of this Court demonstrate that the Oregon court erred in holding that the government must "cause or induce" an occupation in order to effect a physical taking. More to the point perhaps, the decision below is in conflict with the decisions of numerous other lower courts.

B. The Conflict with This Court

In *Kaiser Aetna*, the property owners converted a privately owned lagoon into a marina, thereby connecting the lagoon to a publicly owned bay; subsequently, the United States sought "an injunction to require [the owners] to allow public access" to the waters of the marina on the ground that it had become subject to the federal "navigational servitude." 444 U.S. at 169. Having ruled that "Congress could assure the public a free right of access to the [waters of the marina] if it so chose," *id.* at 174, this Court went on to consider whether Congress could do so "without invoking its eminent domain power and paying just compensation," *id.* at 180. The Court emphatically ruled that Congress could ***not***, because "the imposition of the navigational servitude in this context will result in an *actual physical invasion* of the privately owned marina." *Id.* (emphasis added). But just who would actually be doing the "invading"? Not the gov-

ernment, of course, but rather members of the boating "public" based on their own independent choices. To use the Oregon court's terms, the government did not "cause or induce" anyone to sail into the marina; instead, the government "ha[d] no control over where" boaters chose to navigate their boats. 1 Pet. App. at A–15. In other words, it was no defense to the finding of a physical taking in *Kaiser Aetna* that members of the boating public were not placed or induced onto or into the waters of the private marina by the government.

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982), is similar in essential regards. In that case, "New York law provide[d] that a landlord must permit a cable television company to install its cable facilities upon his property." *Id.* at 421. This Court concluded that "such a physical occupation of property is a taking." *Id.* Yet again, it was not the *government* (or its agents) who occupied the landlord's property; rather, the occupier was a privately owned cable television company acting on its own behest. Indeed, the Court characterized the case as one in which the government's regulations "require[d] the landlord to suffer the physical occupation of a portion of his building *by a third party*." *Id.* at 440 (emphasis added); *accord Florida Power Corp.*, 480 U.S. at 252 (quoting same). As relevant to the present case, it is crucial to recognize that the New York City government did not "cause or induce" the cable company to occupy the property of the landlord. 1 Pet. App. at A–15. No, the government merely "permit[ted]" the occupation, *Loretto*, 458 U.S. at 421, and thereafter "simply regulated [the landlord's] use of the property based on the presence of the [cable facilities] there," 1 Pet. App. at A–15—that is, forbidding the landlord to take any action that would interfere with or otherwise disturb those facilities.

Finally, in *Nollan v. California Coastal Commission*, 483 U.S. 825, 831 (1987), this Court held that had the government "required the [property owners] to make an easement across their beachfront available to the public on a permanent basis,

we have no doubt there would have been a taking." The Court reached this conclusion *even though* that property would have been periodically occupied not by the government, but by random members of the beachgoing public:

> In *Loretto* we observed that where governmental action results in "a permanent physical occupation" of the property, by the government itself *or by others*, "our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner."

Id. at 831-32 (emphasis added and citations omitted) (quoting *Loretto*, 458 U.S. at 432-35). *Nollan* therefore confirms that physical occupations may be effected "by the government itself *or by others*." Because the government in no way caused or induced the public to traverse the property owners' beachfront —the government merely required that a lateral easement be made "available"—*Nollan* also confirms that the government's *causing or inducing* the occupation is not a prerequisite to its liability for a taking by physical occupation.

C. The Conflict with Other Lower Courts

In the past decade, a variety of statutory and regulatory schemes have required the lower courts to apply this Court's physical takings jurisprudence. Several of the resulting decisions are in conflict with the decision below.

We turn first to the "mandatory access provision" of the federal Pole Attachment Act. Under that provision, a public utility company "shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it" for the purpose of installing and carrying television or telephone wires. 47 U.S.C. § 224(f)(1). Under implementing regulations issued by the Federal Communications Commission, a

cable or telephone company's access to, and use of, a utility's property to install and carry wires is triggered by a *request* from that company.[2] Accordingly, any use of that property by third parties depends on the independent choices of those parties. In other words, just as in *Nollan*, the statute in no way *causes or induces* cable or telephone companies to use the utility's property; rather, the statute "requires that poles, ducts, conduits and rights-of-way controlled by utilities [be] *made available*" to requesting companies.[3]

Notwithstanding the lack of causation or inducement on the part of the government, the Eleventh Circuit had no trouble concluding that "the Act's mandatory access provision effects a [physical] taking of a utility's property." *Gulf Power Co. v. United States*, 187 F.3d 1324, 1328 (11th Cir. 1999) (citation omitted). The court easily recognized that, like Boise Cascade vis-à-vis nesting owls, a utility "has no choice but to permit a [cable or telephone company] to permanently occupy physical space" on or in its property. *Id.* In contrast to the Oregon court below, the Eleventh Circuit correctly perceived that "[s]uch a permanent, physical occupation of property falls squarely within the *Loretto* rule." *Id.* at 1329.

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[2] *See* 47 C.F.R. § 1.1403(b) ("*Requests for access* to a utility's poles, ducts, conduits or rights-of-way by a telecommunications carrier or cable operator must be in writing." (emphasis added)); 61 Fed. Reg. 45,476, 45,588 (1996) (observing that the statute "reflects Congress' determination that utilities generally must accommodate *requests for access* by telecommunications carriers and cable operators" (emphasis added)); *id.* at 44,593 ("Section 224(f)(1) mandates that a utility grant access to a *requesting* telecommunications provider or cable system operator . . . ." (emphasis added)).

[3] H.R. Conf. Rep. No. 104-458, *reprinted in* 142 Cong. Rec. H1078, H1133 (Jan. 31, 1996) (emphasis added) (discussing "Section 204 of the Senate bill"); *cf. id.* at H1134 (observing that as to Section 204, "[t]he conference agreement adopts the Senate provision with modifications").

The conflict is even more explicit, however. Recall that the court below ruled that requiring Boise to acquiesce in the presence of the owls did not effect a physical occupation because the Board of Forestry "*simply regulated* [Boise's] use of the property based on the presence of the spotted owls there." 1 Pet. App. at A–15 (emphasis added). The Eleventh Circuit confronted a similar argument—"the mandatory access provision [is] a *simple regulatory* condition"—and quickly rejected it as "meritless." *Gulf Power Co.*, 187 F.3d at 1330 (emphasis added). "Characterizing the mandatory access provision as a regulatory condition," concluded the court, "cannot change the fact that it effects a taking by requiring a utility to submit to a permanent, physical occupation of its property." *Id.* at 1331.

More generally, the "power to regulate [property] does not extend to taking without just compensation the right of a [property owner] to exclude unwanted occupiers of its property." *Id.* As the Eleventh Circuit observed, among other arguments this Court rejected in *Loretto* "was the argument that the statute was merely a 'permissible regulation of the use of real property.' . . . [A]lthough property is subject to broad regulatory power, a regulation becomes a taking when the government authorizes permanent physical occupation by a third party." *Id.* at 1328 (quoting *Loretto*, 458 U.S. at 439).

We turn next to another "access" scheme, this one called "physical co-location," under which local telephone exchange companies (LECs) are required "to set aside a portion of their central offices for occupation and use by competitive access providers" (CAPs). *Bell Atlantic Telephone Cos. v. FCC*, 24 F.3d 1441, 1443 (D.C. Cir. 1994). "In physical co-location," according to the D.C. Circuit, "the CAP strings its cable to the LEC central office"; the LEC "must then turn over space within the central office in which the CAP may install and operate its circuit terminating equipment." *Id.* at 1444. The *Bell Atlantic* litigation involved a challenge to an FCC order that generally "require[d] LECs to permit CAPs to connect their facilities to

the LEC network through" physical co-location. *Id.* In sustaining this challenge, the D.C. Circuit concluded that the order "directly implicates the Just Compensation Clause of the Fifth Amendment, under which a 'permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve.' " *Id.* at 1445 (quoting *Loretto*, 458 U.S. at 426). The FCC order would create "an identifiable class of cases in which application of [the order] will necessarily constitute a taking." *Id.* (quoting *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 128 n.5 (1985)).[4]

Like the Eleventh Circuit's decision in *Gulf Power*, the D.C. Circuit's decision in *Bell Atlantic* cannot be squared with the decision below. Although the challenged order was said to "require" physical co-location, *Bell Atlantic*, 24 F.3d at 1443, that was merely shorthand for saying that physical co-location was required *if, and only if, it was requested by the CAP. See id.* at 1444 (framing issue as whether "the Commission lacks authority . . . to require LECs to permit physical co-location of equipment *upon demand*" (emphasis added)). In other words, perhaps to labor the point, the order found to effect a physical taking in *Bell Atlantic* surely did not *cause or induce* the CAP to occupy LEC property. Therefore, the fact that "[t]he state

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[4] *Accord GTE Service Corp. v. FCC*, 205 F.3d 416, 421 (D.C. Cir. 2000) (vacating a subsequent FCC co-location order in part because it "may result in unnecessary [physical] takings of LEC property"); *GTE Southwest Inc. v. Public Utility Commission*, 10 S.W.3d 7, 11 (Tex. App. 1999) (ruling that "the Commission's order amounts to a physical or per se taking of GTE's cables and facilities by requiring that GTE surrender its right to exclude others from physical use of its properties"); *id.* at 13 (explicitly "disagree[ing]" with the contention that "the Commission's order amounts not to a taking in the *Loretto* sense, but only to permissible regulation"); *GTE Northwest Inc. v. Public Utility Commission*, 900 P.2d 495 (Or. 1995) (invalidating state-law physical co-location scheme as a physical taking), *cert. denied*, 517 U.S. 1155 (1996).

did not cause or induce the spotted owls to breed on [Boise's] property," 1 Pet. App. at A–15, offers no basis for distinguishing the decision below. No basis, that is, other than a straightforward conflict in the interpretation of federal takings law.[5]

In all of these cases it could reasonably be asserted, as the court below asserted here, that the government "simply regulated [the owners'] use of the property based on the presence of" the occupying instrumentalities. 1 Pet. App. at A–14. That is, whenever boaters, cable equipment, telephone equipment, or beachgoers were "present" on their property, the owners were restricted in their "use" of it. But the restrictions were of a particular kind: the owners could not use their property in ways that would interfere with the occupiers' government-sanctioned use. That is precisely the kind of "regulation" Boise endured based on the presence of spotted owls—restrictions on using its forestland in ways that would interfere with the owls' present and future use of that same land as habitat. That is, Boise's use of its property was not regulated in the abstract; it was regulated for the purpose of—and with the actual effect of—requiring Boise to acquiesce in the owls' presence and, concomitantly, preventing Boise from excluding the owls. The *whole point* of the Board of Forestry regulations applied against Boise is to ensure that spotted owls remain in their nests on the designated

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[5] In the reported decisions discussed herein, the range of things that can effect takings by physical occupation runs from humans (*Kaiser Aetna* and *Nollan*) all the way to inanimate objects (*Loretto*, *Gulf Power*, and *Bell Atlantic*). Moreover, one can easily imagine takings by physical occupation where domestic animals are involved; e.g., the government requires *A* to open his pastureland to grazing by *B*'s cattle. Given this spectrum, there is no reason why "wild" animals such as spotted owls should be categorically excluded from physical occupation analysis. Certainly, it cannot be because the government does not "control" wild animals. As the decisions demonstrate, what counts is not control by the government but "required acquiescence" on the part of the property owner. *Yee*, 503 U.S. at 527.

property. *See, e.g.*, Or. Admin. R. 629-665-0210(1)(b) (mandating that a timber harvesting plan provide for "[p]revention of disturbances resulting from operation activities *which cause the owls to flush from* [i.e., *leave*] *the nesting site*" (emphasis added)), *in* 1 Pet. App. at J–1.

If the government could be liable for a taking by physical occupation in *Kaiser Aetna*, *Loretto*, or *Nollan* without having "cause or induced" the third-party occupations, the government can be (and is) liable for such a taking here. If "simply regulating" private property based on the presence of government-sanctioned third-party occupiers could effect a physical taking in *Kaiser Aetna*, *Loretto*, or *Nollan*, it can (and did) effect such a taking here. In ruling otherwise, the Oregon court departed from this Court's takings jurisprudence, thereby exacerbating a conflict among the lower courts. The Court should grant the petition for certiorari to resolve that conflict.

CONCLUSION

The petition for writ certiorari should be granted.

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No. 00-1238

In the
Supreme Court of the United States

October Term, 2000

BOISE CASCADE CORPORATION, a Delaware corporation,
Petitioner,

v.

STATE OF OREGON,
Respondent.

On Petition for Writ of Certiorari to the Oregon Court of Appeals

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AMICUS CURIAE BRIEF OF APA—THE ENGINEERED WOOD ASSOCIATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether a state regulation that requires private landowners to reserve significant acreage as a wildlife habitat for certain species necessitates compensation under the Fifth and Fourteenth Amendments.

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INTEREST OF *AMICUS CURIAE*

APA—The Engineered Wood Association ("APA" or "*amicus*") is a nonprofit trade association whose members produce a variety of engineered wood products, including plywood, oriented strand board, glued laminated timber, composite panels, wood I-joists, and laminated veneer lumber.[1] APA-member mills produce approximately 75 percent of the structural wood panel products manufactured in North America.

APA members depend on a readily available supply of harvested timber, much of it from privately owned lands. Environmental regulations that protect species habitat exact enormous costs on private landowners if the government does not compensate landowners—pursuant to the Fifth and Fourteenth Amendments—for their losses resulting from their inability to harvest timber. Those costs, if absorbed through price increases, are then passed on to APA members. *Amicus* is therefore very interested in the fair and equitable distribution of the costs associated with species habitat protection. Although APA supports the public goals behind

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[1] *Amicus* has filed with the Clerk of this Court letters from all parties reflecting their consent to the filing of this *amicus curiae* brief. Pursuant to Supreme Court Rule 37.6, *amicus* certifies that no counsel for a party authored this brief in whole or in part; and that no person other than

species preservation, it believes that the United States Constitution requires that the costs involved in that endeavor should rest "upon the public at large, rather than on fortuitously accountable individual landowners." *Babbitt v. Sweet Home Chapter of Cmtys. for a Great Oregon*, 515 U.S. 687, 735-36 (1995) (Scalia, J., dissenting).

STATEMENT

Amicus adopts Petitioner's statement of the case. Oregon, like many other Western states, has enacted a Forest Practices Act governing the harvesting of timber on private and State-owned land. OR. REV. STAT. §§ 527.610 *et seq.* (1999). Under that Act, the State Board of Forestry has the authority to adopt rules related to forest practice standards, reforestation procedures, pollution control, water quality, scenic areas, and the protection of fish and wildlife resources. OR. REV. STAT. § 527.714 - .770 (1999).

Acting under the authority of the Forest Practices Act, the Board of Forestry adopted a regulation to protect the northern spotted owl. In the event that a proposed logging operation would conflict with a spotted owl nesting site, the operator must submit a written plan to the State Forester that includes "[a] 70 acre area of suitable spotted owl habitat

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amicus curiae contributed monetarily to the preparation and submission of this brief.

encompassing the nest site, to be maintained as suitable spotted owl habitat." OR. ADMIN. R. 629-665-0210(1)(a) (2000), Pet. App. J.[2] The subject regulation does not provide a variance procedure through which a landowner may attempt to reduce the number of acres that must be left intact. However, the Board of Forestry *may* consider an exception to the required habitat conservation if the operator has obtained an incidental take permit ("ITP") under Section 10 of the federal Endangered Species Act ("ESA"), 16 U.S.C. § 1539(a) (2000). OR. ADMIN. R. 629-665-0210(5) (2000).

To place the ITP in the context of the entire ESA, one should understand that Section 9 of the ESA makes it unlawful for any "person" to "take" any endangered species of fish or wildlife. 16 U.S.C. § 1538(a)(1)(B) (2000). The term "take" means "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct." 16 U.S.C. § 1532(19) (2000).[3] Persons

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[2] At the time that Petitioner sought the Board of Forestry's approval to harvest its timber, the effectively identical rule was promulgated at OR. ADMIN. R. 629-24-809. *Boise Cascade Corp. v. State of Oregon*, 991 P.2d 563, 564 n.1 (Or. Ct. App. 1999), Pet. App. A.

[3] "Take" can also be accomplished through habitat modification, without any actual loss of species life. *See* 50 C.F.R. § 17.3 (defining the "harm" element of take to "include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering").

who believe that their actions may cause "take" of a given listed species can seek an ITP under Section 10. However, it is "not mandatory" to seek an ITP. *Defenders of Wildlife v. Bernal*, 204 F.3d 920, 927 (9th Cir. 2000). Further, states themselves are not obligated to enforce the ESA's provisions. 16 U.S.C. § 1540 (2000) (delegating enforcement authority to the U.S. Fish & Wildlife Service, the Justice Department, and to individuals bringing citizen suits). The ESA could not compel states to enforce its provisions in any event without running afoul of the Tenth Amendment. *See Printz v. United States*, 521 U.S. 898, 933 (1997).

As a result of the subject regulation, Petitioner was prevented from harvesting its timber on a 56-acre area for a period of nearly five years, which caused Petitioner to suffer a loss of $1,820,059. Pet. at 9-10.

REASONS FOR GRANTING THE PETITION

A. The Court of Appeals' Decision That Petitioner Failed to Establish a "Physical" Taking Is a Misinterpretation of the Relevant Decisions of This Court

The Oregon Court of Appeals ruled that the trial court erred when it denied Respondent's motion to strike Petitioner's allegations that the subject regulation effected a physical taking under *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). *See Boise Cascade Corp.*

v. State, 991 P.2d 563, 570 (Or. Ct. App.) (1999), Pet. App. A. In so ruling, the Court of Appeals focused on language from *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166 (1871), cited in *Loretto*, that stated "'where real estate is actually invaded by *superinduced* additions of water, earth, sand or other material, or by having any *artificial* structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking.'" 991 P.2d at 569 (quoting *Pumpelly*, 80 U.S. (13 Wall.) at 181 (emphasis supplied by Court of Appeals)). The Court of Appeals therefore appeared to assume that the test for a physical taking is whether the government itself introduces or causes the physical invasion onto the owner's property:

> The state did not cause or induce the spotted owls to breed on plaintiff's property. The state simply regulated plaintiff's use of the property based on the presence of the spotted owls there. Although plaintiffs [*sic*] have stated a claim for a regulatory taking, they [*sic*] have not stated a claim for a "physical occupation" taking under *Loretto*.

991 P.2d at 570.

The Court of Appeals' interpretation fundamentally misreads this Court's physical taking jurisprudence and contradicts its precedents. The fact that the state did not place the owls on Petitioner's property is not determinative of whether a taking occurred; the taking was instead

accomplished by the state's requirement that Petitioner suffer the owls' presence on its property, without having any opportunity to exclude them.[4] "[A] permanent physical occupation *authorized by the government* is a taking without regard to the public interests that it may serve." *Loretto*, 458 U.S. at 426 (emphasis added) and 432 n.9 ("A permanent physical occupation authorized by state law is a taking without regard to whether the State, or instead a party authorized by the State, is the occupant."). This Court reiterated the importance of this principle in *Yee v. City of Escondido*, 503 U.S. 519 (1992), where it noted that "[t]he government effects a physical taking only where it *requires* the landowner to submit to the physical occupation of his land." 503 U.S. at 527 (emphasis in original).

The subject regulation definitely requires Petitioner to submit to the physical occupation of its land by the owls. Although the state did not place the owls onto Petitioner's property, it did grant the owls a special status that elevated them above any other animal (or human, for that matter) that might be "found" on the property. For example, assume that Petitioner's trees were being damaged by a family of beavers living on Petitioner's property. The beavers, like the owls, are

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[4] Under the subject regulation, Petitioner was required to prevent disturbances that "cause owls to flush from the nesting site." OR. ADMIN. R. 629-665-0210(1)(b), Pet. App. J.

a naturally occurring condition that may be on the property and not placed there by the state. However, unlike the owls, Petitioner can relocate the beavers to another site where they will not affect Petitioner's property. The subject regulation strips Petitioner of the right to exclude, which is "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Dolan v. City of Tigard*, 512 U.S. 374, 393 (1994) (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979)); *cf. Yee*, 503 U.S. at 528 (noting that the government did not remove right to exclude from petitioners because their tenants "were invited by petitioners, not forced upon them by the government").

The state has an obviously legitimate interest in taking steps to protect endangered species. However, the costs of that protection should not fall entirely on private landowners' shoulders. *Dolan*, 512 U.S. at 384 ("One of the principal purposes of the Takings Clause is 'to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public.'") (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)). That reasoning is particularly strong in the case of species habitat protection, given that—as of 1993—nearly 80 percent of all ESA endangered or threatened species lived entirely or partially on private lands. *See* U.S. GEN. ACCOUNTING

OFFICE, ENDANGERED SPECIES: INFORMATION ON SPECIES PROTECTION ON NONFEDERAL LANDS 4-6 (1994). To require private landowners—who, by having not previously harvested their timber, have actually contributed to species preservation more than most[5]—to subsequently bear the sole costs of state-ordered habitat preservation when they do seek to reap the economic benefits of their property, is beyond ironic; it is fundamentally unfair. Granting the petition will allow this Court to clarify its *Loretto* takings jurisprudence in the context of government-compelled habitat preservation.

Protecting endangered species is a laudable goal; however, because that endeavor benefits the general public, its costs should be borne by the public as well. The subject regulation requires Petitioner to suffer the owls' physical invasion of its property. The Court of Appeals therefore erred when it ruled that Petitioner failed to state a claim of a physical taking under *Loretto*. This Court should grant the petition to correct the Court of Appeals' error, and to provide

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[5] As of 1995, federal timberlands represented almost half (47.8 percent) of the total timberlands in Washington, Oregon, and California. U.S. GEN. ACCOUNTING OFFICE, PRIVATE TIMBERLANDS: PRIVATE TIMBER HARVESTS NOT LIKELY TO REPLACE DECLINING FEDERAL HARVESTS 2 (1995). Up until 1991, when federal courts began imposing injunctions on federal timber sales, federal and other publicly owned timber was being harvested at a significant rate. In 1989, shortly before the injunctions went into effect, over 8 billion board feet of timber was harvested from public lands in Washington, Oregon, and California. *Id.* at 5.

guidance regarding the appropriate balance that should be struck between public and private interests when private landowners are required to carry out public goals.

B. The Court of Appeals Incorrectly Ruled That This Matter Was Not Ripe

The Court of Appeals ruled that this action was unripe because Petitioner failed to seek an ITP pursuant to Section 10 of the ESA. 991 P.2d at 572, Pet. App. A. Not only does this ruling conflict with this Court's precedents, it gives the federal government undue authority over a state regulatory system, and further skews the already-lengthy process through which property owners attempt to determine their rights toward less, not more, finality.

A claim that governmental regulations effect a taking of property "is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186 (1985). That criterion was met in this case when the Oregon Board of Forestry affirmed the State Forester's denial of Petitioner's amended plan to harvest the subject timber.[6] The fact that Petitioner did not

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[6] Both the Oregon Court of Appeals and the Oregon Supreme Court affirmed that agency's decision. Pet. App. G and H.

apply for an ITP has no bearing on the finality of the Board of Forestry's decision.

Petitioner is in a fundamentally different situation than the one presented in *Williamson County*, where the petitioner was a real estate developer who did not seek any variances whatsoever from the local agency charged with administering property development, notwithstanding the fact that the regulations were structured in such a way that preliminary development plans would nearly always be disapproved pending further variance application procedures. 473 U.S. at 190. Unlike the planning commission in *Williamson County*, the Board of Forestry is not a "singularly flexible institution[]" that, although it "take[s] with one hand [it] may give back with the other." *McDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 350 (1986). The subject regulation in this case, in contrast, has no "variance" procedure at all. Indeed, the only way that the Board of Forestry could have granted a "variance" from the requirement to preserve a "70 acre area of suitable spotted owl habitat encompassing the nest site," OR. ADMIN. R. 629-665-0210(1)(a), Pet. App. J, was if Petitioner had obtained an ITP, although, as Petitioner points out and the Court of Appeals did not dispute, the procurement of that permit by no means guaranteed that Petitioner would have received a

"variance." 991 P.2d at 572, Pet. App. A. Indeed, the Board of Forestry has the ability to completely disregard an ITP when deciding whether to approve an operator's harvest plan.

However, the Court of Appeals inappropriately ended the inquiry there, because even if Petitioner had applied for—and received—an ITP, the outcome for Petitioner would have been no different. Because incidental take permits must include habitat conservation plans (16 U.S.C. § 1539(a)(2)(B)), Petitioner in all likelihood would have been obligated to preserve virtually the same 70 acres in accordance with the incidental take permit,[7] rendering that portion of the property nearly valueless and almost entirely interfering with Petitioner's "reasonable investment-backed expectations." *Williamson County*, 473 U.S. at 191 (discussing relevant factors to consider when determining whether a taking has occurred); *see also Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978). The typical ripeness concern is that "[t]hose factors simply cannot be evaluated until the administrative agency has arrived at a

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[7] That scenario actually presents an even more pernicious taking than the one this Court must consider: a taking with no "taker" against whom the property owner can seek redress. Under that example, the State could argue that it is not the taker because the ITP's habitat preservation requirements are the cause of the "take." On the other hand, the federal government could claim not to be the taker because the property owner voluntarily applied for the ITP. Trapped in a vicious circle between two entirely different levels of government, the property owner would be left with no recourse from either.

final, definitive position regarding how it will apply the regulations at issue to the particular land in question." 473 U.S. at 191. In this case, however, it is clear that—regardless of whether it obtained an ITP—Petitioner nevertheless would have been deprived of the full value of its reasonable investment-backed expectations. Petitioner's taking claim is therefore ripe, notwithstanding Petitioner's failure to seek an incidental take permit.

Further, none of this Court's ripeness precedents indicate that a taking claimant must seek a variance from an entirely different government agency than the one that is the final decisionmaker. *Cf. Williamson County*, 473 U.S. at 193 (noting that land developer did not need to appeal rejection of its preliminary plat to a different zoning board because that board had no right to participate in the decisionmaking process). By denying Petitioner's request to harvest its timber, the Board of Forestry "arrived at a definitive position on the issue that inflict[ed] an actual, concrete injury." *Id.* That is all that Petitioner needed to demonstrate to establish that this matter was ripe.

CONCLUSION

For the foregoing reasons, APA urges the Court to grant the petition.

Respectfully submitted,

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